167-409

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 255.

CHARLES E. HOVEY, AS SURVIVOR OF WILLIAM P. DOLE, PLAINTIFF IN ERROR,

vs.

GEORGE ELLIOTT AND GEORGE L. ELLIOTT, AS EXECUTORS, ETC., OF JOHN ELLIOTT, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED APRIL 5, 1895.

(15,860.)

(15,860.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 255.

CHARLES E. HOVEY, AS SURVIVOR OF WILLIAM P. DOLE, PLAINTIFF IN ERROR,

vs.

GEORGE ELLIOTT AND GEORGE L. ELLIOTT, AS EXECUTORS, ETC., OF JOHN ELLIOTT, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Clerk's certificate and return	a	1
Citation	b	1
Writ of error	c	1
Petition for writ of error	e	2
Bond	h	3
Caption	i	6
Record on appeal	j	6
Statement	1	6
Notice of appeal to general term	1	6
Judgment, special term	2	6
Summons	3	7
Amended complaint	4	8

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 23, 1897.

	Original.	Print.
Amended answer	7	10
Exhibit E. No. 1—Original bill of complaint in case of Hovey and Dole *vs.* McDonald and White, supreme court of the District of Columbia, equity, No. 3937	15	15
Exhibit H. and D. No. 1—Agreement between Hovey, Dole, and McDonald	19	18
E. No. 2—Amended bill of complaint in case of Hovey and Dole *vs.* McDonald and White, supreme court of the District of Columbia, equity, No. 3937	21	20
E. No. 3—Decree sustaining demurrer and dismissing bill in case of Hovey and Dole *vs.* McDonald and White, supreme court of the District of Columbia, equity, No. 3937	39	32
E. No. 4—Order on receiver to pay fund to McDonald and White in case of Hovey and Dole *vs.* McDonald and White, supreme court of the District of Columbia, equity, No. 3937	39	32
E. No. 5—Decree of general term of supreme court of the District of Columbia, of March 4, 1876, in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937	40	33
E. No. 6—Answer and cross-bill in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia	41	33
E. No. 7—Amended replication of complainants in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia	66	50
E. No. 8—Motion to strike out cross-bill in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia	66	50
E. No. 9—Order transferring to general term motions to restore money and suppress depositions in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia	68	51
E. No. 10—Decree in general term of supreme court of the District of Columbia requiring defendants to pay money into registry of court in case of Hovey and Dole *vs.* McDonald and White, No. 3937, equity	69	52

Exhibit E. No. 11—Notice of motion, motion for rule for contempt, copies of affidavits, and affidavit of service on Wm. A. Cook in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia 70 52

E. No. 12—Decree of general term of supreme court of the District of Columbia on rule upon defendants for contempt in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937 ..... 72 53

E. No. 13—Motion for rule to show cause and service of same in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia 73 54

E. No. 14—Order on motion to take answer from files in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia 75 55

E. No. 15—Order *pro confesso*, February 12, 1878, in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia 76 56

E. No. 16—Decree making absolute former decree in case of Hovey and Dole *vs.* McDonald and White, equity, No. 3937, supreme court of the District of Columbia 77 57

Order of reference 79 58
Referee's report 81 59
Plaintiffs' requests to find 97 71
Defendants' requests to find 111 81
Exceptions 130 94
Referee's opinion 135 97
Summons 150 108
Notice of appearance and demand 151 109
Complaint 152 109
Amended answer 158 113
Motion for judgment on answer as frivolous 162 116
Order denying motion 163 116
Notice of trial 164 117
Note of issue 165 117
Clerk's minutes 165 117
Motion for commission and affidavits thereon 165 118
Interrogatories 167 118
Order for commission 169 120
Order vacating commission 171 121

	Original.	Print.
Petition for removal to United States circuit court	172	121
Bond on removal to United States circuit court	175	123
Order remanding cause to superior court	179	126
Order of general term	180	126
Judgment of general term	181	127
Notice of appeal to court of appeals	182	127
Opinion of general term	183	128
Suggestion of death of Wm. P. Dole	185	128
Judgment and remittitur	187	129
Opinion	190	130
Assignment of errors	206	139
Stipulation to make Defendants' Exhibit No. 1 part of record	210	140

a UNITED STATES OF AMERICA, } ss:
State of New York, }

In pursuance of the command of the writ of error within, I, Gorham Parks, clerk of the court of appeals of the State of New York, herewith transmit a true copy of the record and all proceedings in this case of Charles E. Hovey, survivor of William P. Dole, plaintiff in error, against George Elliott and George L. Elliott, as executors, etc., of John Elliot, deceased, defendants in error, lately pending in the court of appeals for the State of New York, under my hand and seal of this court, and annex hereto and transmit herewith a true copy of the opinion filed in this case.

Witness my official signature and seal of said court of appeals of the State of New York, at the capitol, at the city of Albany, State of New York, this 2nd day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America one hundred and nineteen.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS,
Clerk of the Court of Appeals, State of New York.

b UNITED STATES OF AMERICA, ss:

George Elliott and George L. Elliott, as executors, etc., of John Elliott, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in April next ensuing the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein Charles E. Hovey, as survivor of William P. Dole, is plaintiff in error, and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Charles Andrews, chief judge of the said court of appeals of the State of New York, this 29th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

CHAS. ANDREWS,
Chief Judge of Court of Appeals of State of New York.

c UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a plea which is in the said court of appeals of the State of New York, before you or some of you, being the highest court of law

or equity of the said State in which decision could be had in the said suit between Charles E. Hovey, as survivor of William P. Dole, plaintiff, and George Elliott and George L. Elliott, as executors, etc., of John Elliott, deceased, defendants, wherein a right, privilege, or immunity was claimed under a clause of the Constitution of the United States and under a statute of the United States and the decision was against the right, privilege, or immunity specially set up or claimed under such clause of said Constitution or under said statute, a manifest error has happened, to the great damage of the said Charles E. Hovey, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
d with this writ, so that you have the same at Washington on the second Monday of April next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Utica, in the northern district of New York, the 14th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York.

The above writ allowed March 12, 1895.
Bond of $100.00 to be given.

CHAS. ANDREWS,
Chief Judge Court of Appeals of the State of New York.

e Court of Appeals of the State of New York.

CHARLES E. HOVEY, as Survivor of William P. Dole, Plaintiff,
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors, etc., of John Elliott, Deceased, Defendants.

To the court of appeals of the State of New York:

The petition of Charles E. Hovey, of the city of Washington, District of Columbia, plaintiff in the above-entitled action, respectfully shows—

That a judgment affirming the judgment of the court below in this action was herein rendered by the court of appeals on the twenty-sixth day of February, 1895. In said action your petitioner

is advised and states that a right, privilege, or immunity was claimed by said petitioner under a clause of the Constitution of the United States and under a statute of the United States and the decision of the said court of appeals was against the right, privilege, or immunity specially set up or claimed under said clause of the said Constitution or under said statute. Your petitioner therefore desires to avail himself of the right and practice in such cases made and provided by a writ of error to the Supreme Court
f of the United States. Your petitioner therefore prays that the said writ may be allowed by this court.

And your petitioner will ever pray, etc.

Dated New York city, March 11th, 1895.

CHARLES E. HOVEY,
By FREDERICK S. DUNCAN,
His Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

Frederick S. Duncan, being duly sworn, says that he is the attorney for Charles E. Hovey, the plaintiff in the above-entitled action and the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true except as to matters stated to be alleged upon information and belief, and as to those he believes it to be true.

That the reason that this petition is not verified by the petitioner is that the said petitioner is not within the county or State of New York; that the sources of deponent's information and the ground of his belief are derived from his familiarity with this action as the attorney for the petitioner herein.

FREDERICK S. DUNCAN.

Sworn to before me this 11th day of March, 1895.

[Seal of Rob't F. Gaylord, Notary Public, New York County, N. Y.]

ROB'T F. GAYLORD,
Notary Public, N. Y. Co., N. Y.

g [Endorsed:] Court of appeals. Chas. E. Hovey, etc., plaintiff, against George Elliott, etc., defendants. Writ of error, citation, petition.

h Court of Appeals of the State of New York.

CHARLES E. HOVEY, as Survivor of William P. Dole, Plaintiff,
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors, etc., of John Elliott, Deceased, Defendants.

Know all men by these presents that the American Surety Company of New York, having an office and principal place of business at No. 160 Broadway, in the city of New York, is held and firmly bound unto the defendants, George Elliott and George L. Elliott, as

executors, etc., of John Elliott, deceased, in the full and just sum of one hundred dollars ($100), to be paid to the said defendants, George Elliott and George L. Elliott, as executors, etc., of John Elliott, deceased, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, the said The American Surety Company of New York binds itself, its successors or representatives, by these presents.

Sealed with the seal of the said company and dated this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a term of the court of appeals of the State of New York, in an action depending in said court between Charles E. Hovey, as survivor of William P. Dole, plaintiff, against
i George Elliott and George L. Elliott, as executors, etc., of John Elliott, deceased, defendants, a judgment was rendered against the said Charles E. Hovey, and the said Charles E. Hovey having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action, and a citation directed to the said George Elliott and George L. Elliott, defendants, admonishing them to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, on the second Monday of April next:

Now, the condition of the above obligation is such that if the said Charles E. Hovey shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated New York, March 12, 1895.

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *2d Vice-President.*
[L. S.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

j STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 13th day of March, 1895, before me personally appeared David B. Sickels, 2d vice-president of the American Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the 2d vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of trustees of said company, and that he signed said instrument as 2d vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893; and the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said company; that the signature of said Cort-

landt S. Van Rensselaer, subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said board of trustees and in the presence of him, the said David B. Sickels, 2d vice-president.

GEORGE L. HOLMES,
[L. S.] *Notary Public, No. 72, New York County.*

Certificate filed in Kings county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be, and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed, such guarantee, bonds, and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

CITY AND COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolutions with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

[L. S.] Given under my hand and the seal of the company, at the city of New York, this 13th day of March, 1895.

CORTLANDT S. VAN RENSSELAER, *Attorney.*

Approved by—

CHAS. ANDREWS,
Chief Judge of Court of Appeals of State of New York.

Dated Mar. 14th, 1895.

Endorsed: "Bond on appeal to U. S. Supreme Court. Filed March 14, 1895."

(A copy.)

[Seal Court of Appeals, State of New York.]

GORHAM PARKS,
Clerk Court of Appeals, State of New York.

l Court of Appeals.

CHARLES E. HOVEY, as Survivor of William P. Dole, Plaintiff-Appellant,
vs.
GEORGE ELLIOTT and GEORGE L. ELLIOTT, Ex'c'rs, &c., Defendants, Respondents.

Case on Appeal.

Frederick S. Duncan, attorney for appellants, 120 Broadway, New York city.
R. D. Harris, attorney for respondents, 35 William street, New York city.

1 Superior Court, City of New York.

CHARLES E. HOVEY and Another
against
GEORGE ELLIOTT and Another, Executors, and Others.

This action was commenced April 16, 1884.
The complaint was served on John Elliott May 27, 1884.
The third amended answer was served June —, 1890.
The action was originally commenced by Charles E. Hovey and William P. Dole against John Elliott, who died in the year 1888, and George Elliott and George L. Elliott thereafter duly qualified as his executors and were duly substituted as defendants herein.

Superior Court, City of New York.

CHARLES E. HOVEY and Another
v.
GEORGE ELLIOTT and GEORGE L. ELLIOTT, Executors, and Others.

Please take notice that the plaintiff, Charles E. Hovey, appeals to the general term of this court from the judgment entered herein on the 14th day of May, 1892, dismissing the complaint, and for $5,538.18 costs.

THOMAS M. WHEELER, *Pl'ffs Att'y.*

To R. D. Harris, att'y for def'ts Elliotts.
To Thomas Boese, clerk of said court.

2 Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs,
v.
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors, &c., of John Elliott, Deceased, and Others.

John Elliott having been sued in this court as surviving partner of the firm of Riggs & Co., and said John Elliott having died, this action was duly revived against George Elliott and George L. Elliott,

as executors of and under the last will and testament of John Elliott, deceased, and having been at issue as to the said executors, and this cause having been referred to Daniel G. Rollins, Esq., as referee, to hear and determine the same and the issues as to said executors therein, and his report having been duly rendered and filed on the — day of May, 1892, whereby he finds that the defendants, George Elliott and George L. Elliott, as executors of and under the last will and testament of John Elliott, deceased, are entitled to judgment; that the complaint of the plaintiffs be dismissed on the merits with costs, and directing that judgment be entered accordingly in favor of said executors and against the plaintiffs, and due notice of the filing of said report having been given and an extra allowance of fifteen hundred dollars having been granted to the said defendants, as executors, and against the said plaintiffs, and the costs and disbursements having been duly taxed upon notice at the sum of five thousand five hundred and thirty-eight $\frac{18}{100}$ dollars ($5,538.18)—

Now, on motion of R. Duncan Harris, Esq., attorney for the said executors, it is adjudged that the complaint herein as to the
3 defendants, George Elliott and George L. Elliott, executors of and under the last will and testament of John Elliott, deceased, be dismissed on the merits of the action, and that the said defendants, George Elliott and George L. Elliott, as executors, recover of the plaintiffs, Charles E. Hovey and William P. Dole, the sum of fifteen hundred dollars, extra allowance, and the sum of four thousand and thirty-eight $\frac{18}{100}$ dollars, costs and disbursements, making in the aggregate the sum of five thousand five hundred and thirty-eight $\frac{18}{100}$ dollars, and that execution issue therefor against the said plaintiffs.

THOMAS BOESÉ, *Clerk.*

Entered May 14, 1892.

Superior Court, City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs,
v.
JOHN ELLIOTT, CHARLES C. GLOVER, THOMAS HYDE, and ADOLPHUS T. KIECKHOEFFER, Surviving Partners of Riggs & Company, Defendants.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated April 16, 1884.

THOMAS M. WHEELER,
Plaintiffs' Attorney.

Office and post-office address, No. 22 Pine St., room 11, New York, N. Y.

4 Superior Court, City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors of the Last Will and Testament of John Elliott, Deceased, and Charles C. Glover, Thomas Hyde, and Adolphus T. Kieckhoefer, Surviving Partners of Riggs & Company.

The plaintiffs, complaining of the defendants, allege:

That the defendants, during the year 1875, and George W. Riggs were copartners, doing business as bankers under the firm name of Riggs & Company, at the city of Washington, in the District of Columbia, and at the city of New York; that the said George W. Riggs died on or about the — day of September, 1881. That Augustine R. McDonald had a claim against the United States pending before a commission commonly known as the Mixed Commission on British and American Claims; that the said McDonald agreed with the plaintiffs in writing under seal, in consideration of the plaintiffs aiding him in the prosecution of said claim before said commission, to pay to the plaintiffs a sum equal to one-fourth of the amount which should be allowed on said claim, and that the plaintiffs should have a lien therefor upon the said claim and upon any draft, money, or evidence of indebtedness which might be paid or issued thereon; that there was afterwards, about September, 1873, awarded by said commission upon said claim the sum of $197,190 in gold; that thereafter said McDonald pretended to have assigned the said claim to William White; that about the 2d day of October, 1874, the plaintiffs, having filed their bill of complaint
5 therein, commenced an action against the said McDonald and White in the supreme court of the District of Columbia for the establishment of their lien aforesaid; that in said suit an injunction was issued restraining the said McDonald and White from collecting the amount of the said award; that afterwards, in said suit, with the consent of all the parties thereto, an order was made that one-half of the net amount of said award should be paid to the said George W. Riggs, to hold the same subject to the claims, liens, and rights of the plaintiffs, and the said Riggs was ordered to invest the said amount in 3.65 bonds of the District of Columbia, guaranteed by the United States; that under said order the said Riggs received the sum of $107,012.87, and invested it in the said bonds of the District of Columbia, registered. That about the 28th June, 1875, the said McDonald obtained possession of the said bonds from the said Riggs, without the consent of the plaintiffs, with intent to defraud the plaintiffs and deprive them of their claim, lien, and right therein, and with like intent simultaneously sold the said bonds to the said Riggs & Company, who purchased the same with full knowledge of the said fraud and of the claim, lien, and right of the plaintiffs in and to the said bonds, and with full knowledge of the pendency of the said suit between the plaintiffs and McDonald and White, and of the deposit of the said bonds with the said George W. Riggs under the order of the court as aforesaid.

That the plaintiffs had no knowledge or means of knowing of the said purchase of said bonds by the said Riggs & Company until the 17th day of June, 1878.

That, in the said suit pending in the supreme court of the District of Columbia between the plaintiffs and said McDonald and White, the plaintiffs on 17th April, 1878, obtained final judgment, wherein it was decreed that the said defendants, Augustine R. McDonald and William White, pay to the complainants the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold, and that the plaintiffs have a lien upon the said claim of the said McDonald against the United States and upon any draft,
6 money, evidence of indebtedness or proceeds thereof, and said judgment is now in full force and unreversed.

Wherefore the plaintiffs pray that the defendants may be declared and held to be trustees of the said bonds of the District of Columbia for the benefit of the plaintiffs; that it may be decreed that the plaintiffs have a lien and claim upon and right to the said bonds, and that the defendants purchased the said bonds subject to such lien, claim, and right to the extent of one-half of said bonds; that the defendants account to the plaintiffs for the said bonds; that it may be ordered and decreed that the defendants deliver to the plaintiffs one-half of said bonds, and such further or other relief as in the premises may be just and equitable.

THOS. M. WHEELER,
Plaintiffs' Attorney.

DISTRICT OF COLUMBIA, *City of Washington,* } *ss:*

Charles E. Hovey, being duly sworn, says that he is one of the above-named plaintiffs; that he has read the foregoing complaint; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to — true.

CHAS. E. HOVEY.

Sworn to and subscribed before me, a commissioner of deeds for the State of New York, residing in the District of Columbia, at the city of Washington, in said District, this 17th day of May, A. D. 1884.

[COMMISSIONER'S SEAL.] SAM'L C. MILLS,
Commissioner of Deeds for New York.

(Certificate of secretary of state that Mills is a commissioner of deeds for New York.)

7 Superior Court of the City of New York.

CHARLES E. HOVEY and Another, Plaintiffs,
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors of the Last Will and Testament of John Elliott, Deceased, and Others, Defendants.

The separate amended answer of George Elliott and George L. Elliott, as executors, to the complaint of the plaintiffs, by R. D. Harris, their attorney, respectfully shows to this court and alleges as follows:

First. The defendants deny each and every allegation in said complaint contained, except as hereinafter admitted or controverted.

Second. The defendants admit that during the year 1875, John Elliott, Charles C. Glover, Thomas Hyde, and Adolphus T. Kieckhoefer, together with George W. Riggs, were copartners, doing business under the firm name of Riggs & Company, at the city of Washington, in the District of Columbia, and at the city of New York, and that said George W. Riggs died on or about the 24th day of August, 1881.

Third. That as to the other matters and things set forth and alleged in said complaint, these defendants, except as hereinafter particularly set forth, have no knowledge or information sufficient to form a belief, and therefore controvert each and every said allegation in said complaint contained.

And these defendants aver that the said John Elliott was, prior to the year 1870, and thenceforward remained, and at the time of the commencement of this action was, a resident and in-
8 habitant of the city and State of New York, and thereafter to the time of his death remained a resident and inhabitant of the city and State of New York.

Fourth. For a further and separate defence to the cause of action in the complaint alleged, these defendants allege that they have no knowledge or information sufficient to form a belief as to whether Augustine R. McDonald, in the complaint mentioned, made the agreement in the complaint alleged with the plaintiffs, or whether the sum in the complaint alleged was awarded by said commission upon said claim, or whether any action for the establishment of any lien in their favor was commenced by the plaintiff as in the complaint alleged.

These defendants allege, upon information and belief, that a certain action was commenced in the supreme court of the District of Columbia, wherein the plaintiffs herein were plaintiffs and McDonald and White were defendants, and that George W. Riggs was appointed receiver in said action, and that therein it was duly decreed by said court on the 28th day of June, 1875—the said court then having full jurisdiction of all the parties to and over the subject-matter involved in said action, and the like jurisdiction as well to make and direct the said decree as over the receiver in the complaint herein mentioned, George W. Riggs—that the bill of com-

plaint of the plaintiffs in said action be dismissed with costs, and that the said receiver pay and deliver the funds by him held as said receiver to the defendants in said action, said McDonald and White.

That said receiver thereupon, in obedience to the terms and requirements of said decree, delivered unto said McDonald, for and on behalf of the latter and of said White, of whom the said McDonald was then the attorney-in-fact in the premises, all of the bonds then in the hands of said receiver; that is to say, bonds of the District of Columbia, wherein all of the funds that had come into the hands of the said receiver had been by him invested.

And these defendants aver that said decree, as to the matters therein ordered, adjudged, and decreed between said receiver and said plaintiffs, did at all times remain and still remain unreversed and in full force and effect.

Fifth. And these defendants further allege upon information and belief that of the said bonds, all of which had been issued under and in due conformity with the 7th section of the act of Congress approved June 25, 1874, and of the acts amendatory thereof $300 were in coupon bonds payable to bearer and $152,000 in registered bonds payable to said George W. Riggs, receiver, or assigns, and by him as such endorsed in blank before delivery to the said McDonald as aforesaid.

And these defendants admit and allege, upon information and belief, that the said McDonald upon so obtaining the said bonds from the said receiver sold the said bonds so as aforesaid endorsed in blank unto the said firm of Riggs & Co., and at the rate prevailing in the market at the time of sale.

And these defendants, upon information and belief, aver that the delivery of said bonds to the said McDonald and the purchase thereof by the firm of Riggs & Co. in the complaint mentioned were the same delivery and sale hereinbefore set forth and none other.

These defendants have no knowledge or information sufficient to form a belief as to whether said McDonald obtained possession of said bonds with intent to defraud the plaintiffs and deprive them of any claim, lien, or right therein, or as to whether said McDonald with like intent sold said bonds.

And these defendants allege that the said bonds, so endorsed as aforesaid, were at the time the same were so purchased by said firm of Riggs & Co., by and under the laws of the United States and in fact, negotiable securities, and that the said firm of Riggs & Company purchased the said bonds, *bona fide* for value, before maturity, in the usual course of business, as negotiable paper, passing by delivery, under the decree of a court of competent jurisdiction and with no knowledge or suspicion of any fraud committed or contemplated by said McDonald, or of any claim, lien, or right of the plaintiffs in or to said bonds, or of any circumstance tending to restrain the free circulation of the said bonds from hand to hand; and upon information and belief allege that the plaintiffs have no claim, lien, or right in or to said bonds.

10 And these defendants further allege, on information and belief, that long prior to the commencement of this action, without any notice of said pretended claim or lien of the plaintiffs, said firm of Riggs & Company sold all of the said bonds in the regular course of business and delivered the same to the purchasers, and that neither said firm, nor any member thereof, nor these defendants, now have, nor has, or at or since the commencement of this action have had, possession of any of said bonds, nor have, nor has, or at or since the commencement of this action have had, any interest therein.

Sixth. And these defendants further allege, upon information and belief, that the plaintiffs had full knowledge and means of knowing of the purchase of said bonds by said firm of Riggs & Co., on or about the 28th day of June, 1875, the day on which said bonds were so purchased, and these defendants now set up and claim as matter and ground of full defence herein that the said firm of Riggs & Co., by purchasing from said McDonald the said bonds so to him delivered endorsed in blank by said receiver under said decree and direction of said supreme court of the District of Columbia, not only became the lawful holders of negotiable instruments issued under the laws of the United States, but derived and acquired their title thereto under authority exercised under the United States.

Seventh. And for a further and separate defence to the cause of action in the complaint alleged these defendants allege that the cause of action in said complaint alleged did not accrue within six years prior to the commencement of this action.

Eighth. And for a further and separate defence to the cause of action alleged in the complaint, these defendants allege that on the 2d day of October, 1874, the said Charles E. Hovey and William P. Dole had filed in the supreme court of the District of Columbia, against the said Augustine R. McDonald and William White, a certain original bill in equity (with certain exhibits thereto), whereof a true copy is hereunto annexed, marked Exhibit E, No. 1, with the like effect as if the same was herein set forth at length; that thereafter the said McDonald and White

11 having thereafter demurred to the said bill, the same, upon said demurrer, was by the said court on the 21st day of April, 1875, dismissed, with leave, however, to the said Hovey and Dole to file an amended bill in the said suit so commenced by the said original bill; that thereafter, and on the 27th day of April, 1875, the said Hovey and Dole filed, in the said suit against the said McDonald and White, a certain amended bill (in substitution of said original bill), with two certain exhibits, of which said amended bill with its said exhibits a true copy is hereunto annexed marked Exhibit E, No. 2, with the like effect as if the same was herein set forth at length; that thereafter, the said McDonald and White demurred to the said amended bill, and subsequently, and on said last-mentioned demurrer, the said court passed in said suit, on June 24th, 1875, the certain decree, whereof a true copy is hereunto annexed, marked Exhibit E, No. 3, and prayed to be read and considered as part of this answer, and on June 28, 1875, and dur-

ing the continuance of the same term at which was rendered the decree aforesaid, the certain decree, whereof a true copy is hereunto annexed, marked Exhibit E, No. 4, with the like effect as if the same was herein set forth at length; that the said decrees were passed by the said court in special term; but upon appeal, the said court in general term, on the 4th day of March, 1876, reversed the said decrees, and remanded the said suit to the said special term, with leave for the said McDonald and White to answer by a certain decree, whereof a true copy is herewith filed, marked Exhibit E, No. 5, with the like effect as if the same was herein set forth at length; that thereafter, on the 2d day of May, 1876, and within the time allowed by and agreeably to the rules and practice of the said court, the said McDonald and White filed in said suit a certain answer unto the said amended bill, whereof a true copy is hereunto annexed, marked Exhibit E, No. 6, with the like effect as if the same was herein set forth at length; that to the said answer of the said McDonald and White to the said amended bill, the said Hovey and Dole filed in said suit on the 6th day of May, 1876, a gen-
12 eral replication, whereof a true copy, marked Exhibit E, No. 7, is hereto annexed, with the like effect as if the same was herein set forth at length; that on the 5th day of May, 1876, the said Hovey and Dole filed in the said suit a certain motion, whereof a true copy is hereunto annexed, marked Exhibit E, No. 8, with the like effect as if the same was herein set forth at length, which said motion was thereafter and on the 15th day of September, 1876, certified by the said court sitting in special term to be heard in the first instance by the said court sitting in general term, a true copy of which said certifying order is annexed, marked Exhibit E, No. 9, with the like effect as if the same was herein set forth at length. That prior to said motion a large number of depositions had been taken in the said action on the part of the said defendants McDonald and White to be used on the trial of said action on behalf of said defendants in support of the averments of their answer; that thereafter, and on the 19th day of June, 1877, the said court sitting in general term passed in the said cause the certain decree whereof a true copy is hereunto annexed, marked Exhibit E, No. 10, with the like effect as if the same was herein set forth at length; that in the said suit, the said Hovey and Dole filed on the 14th day of September, 1877, a certain motion, whereof a true copy is hereunto annexed, marked Exhibit E, No. 11, with the like effect as if the same was herein set forth at length; that upon the said last-mentioned motion, the said court in general term passed in the said suit on the 8th day of December, 1877, the certain decree or order, whereof a true copy is hereunto annexed, marked Exhibit E, No. 12, with the like effect as if the same was herein set forth at length; that on the 27th day of December, 1877, the said Hovey and Dole moved the said general term for the expurgation of the said answer filed as aforesaid to their amended bill by the said McDonald and White, a true copy of which said motion, marked Exhibit E, No. 13, is hereunto annexed, with the like effect as if the same was herein set forth at length; and on the 29th day of December,

1877, the said court in general term passed in the said suit a
13 certain decree, whereof a true copy is hereunto annexed, marked Exhibit E, No. 14, with the like effect as if the same was herein set forth at length; that thereafter, and on the 12th day of February, 1878, there was passed in the said suit by the said general term the decree *pro confesso*, whereof a true copy is hereunto annexed, marked Exhibit E, No. 15, with the like effect as if the same was herein set forth at length; and that on the 17th day of April, 1878, there was passed in said suit by the said general term the certain decree, whereof a true copy is herewith filed, marked Exhibit E, No. 16, with the like effect as if the same was herein set forth at length, which last-mentioned decree is the supposed final judgment which the complaint in the present action avers to have been obtained by the plaintiffs on the date last aforesaid. And these defendants, upon information and belief, aver, insist, and set up that all of said motions were heard and determined, and all of said orders and decrees entered without regard to, or consideration of, any of said testimony or depositions taken on behalf of said defendants, McDonald and White, in said action as aforesaid.

The defendants aver that the said decree so passed on the 17th day of April, 1878, was rendered solely upon, and in consequence of, the said proceedings appearing in the said exhibits, marked from E, No. 8, to E, No. 15, both inclusive.

And these defendants now specially set up and aver, by way of defence to the present action, that, under the Constitution and the laws of the United States, the said court in general term was without jurisdiction to render the said decree of the 17th day of April, 1878.

And these defendants specially claim, plead, and insist that, under the said Constitution and laws, they enjoy complete immunity from, and can in nowise be bound or affected by, the said last-mentioned decree.

Ninth. And for a further and separate defence to the action, these defendants allege, set up, and aver that the said 3.65 bonds of the District of Columbia were issued under the act of Congress of the United States approved June 20, 1874, and of the acts of said
14 Congress amendatory of said act; that the said coupon bonds and the said bonds so endorsed in blank as aforesaid were sold and delivered to and in good faith purchased for full consideration by the said firm of Riggs & Co. in the said District, and that, under the laws of the United States in force at the time and place of said purchase, the said firm of Riggs & Co. acquired good title to the said bonds, which said title, founded upon the said laws, these defendants now specially allege, set up, and insist upon as a defence to this action.

Tenth. And these defendants further allege, upon information and belief, that the said sale made by said McDonald was made by him with the authority of the said White, and prior thereto the whole title, if any, which said White had, had been transferred to said McDonald.

Wherefore the defendants, George Elliott and George L. Elliott,

as executors of the last will and testament of John Elliott, deceased, pray that the complaint of the plaintiffs may be dismissed with costs.

R. D. HARRIS,
Attorney for Defendants Elliotts.

STATE OF NEW YORK, }
City and County of New York, } ss:

George L. Elliott, being duly sworn, deposes and says that he is one of the defendants in this action; that he has read the aforegoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEO. L. ELLIOTT.

Sworn to before me, this 25th day of June, 1890.

JOHN M. PHILBIN,
Notary Public, N. Y. County.

(It was stipulated that this answer should stand as the answer to the plaintiffs' amended complaint.)

15 EXHIBIT E No. 1.

Original Bill. Filed Oct. 2, 1874.

In the Supreme Court of the District of Columbia.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTIN R. McDONALD and WILLIAM WHITE.
No. 3937, Equity Docket 14.

The complainants say:

1. That the said Charles E. Hovey is a resident of the District of Columbia, and the said William P. Dole of the State of West Virginia.

2. That the said defendant McDonald is a resident of the State of New York, and the said White of the State of Ohio.

3. That the said complainants, in June, 1873, and for a long time before and after that date, were engaged in the business of prosecuting claims against the United States, and in said business had great experience and very considerable success; and that the defendant McDonald is a *a* subject of Great Britain, but for many years past has resided in the United States.

4. That under the 12th article of the treaty of the United States and Great Britain, concluded at Washington on the 8th day of May, A. D. 1871, a commission had been organized and assembled at Washington in September of that year to examine and decide upon

claims presented by British subjects and claims presented by citizens of the United States against the government of Great Britain, and the said defendant, Augustin R. McDonald, having a claim against the Government of the United States, amounting to about two millions of dollars for indemnification for the burning
16 by troops of the United States engaged in suppressing the rebellion of certain large quantities of cotton, the property of said defendant, in certain places in the insurrectionary States, had presented his said claim to the said commission and had proceeded in the prosecution thereof; that in the month of June, A. D. 1873, the said defendant McDonald retained and employed these complainants to aid in the prosecution of his said claim, and the duties undertaken by the complainants and the compensation to be paid them for the performance of said duties were prescribed and fixed by an agreement in writing, signed by the parties and assented to and approved by one Gilbert Moyers, the attorney of the said defendant, heretofore engaged in the prosecution of the said claim, a copy of which agreement is herewith exhibited, marked Exhibit H and D, No. 1, and which is prayed to be taken and read as part of this complaint, and by the said agreement it was provided that the complainants should aid in such manner as by them might be deemed best for the interests of the said defendant in the prosecution of his said claim before the said commission, or before any department of the United States, or through any diplomatic negotiations; and in consideration therefor it was provided that the defendant should pay to the said complainants, or their order, a sum equal to twenty-five per centum (one-fourth) of the amount which might be allowed on said claim, and the payment of said sum was, by the said agreement, made a lien upon the said claim and upon any draft, money or evidence of indebtedness which might be paid or issued thereon. That the complainants faithfully performed all the things so as aforesaid by them agreed to be performed, and that on the 25th day of September, A. D. 1873, there was allowed and awarded by the said commission on the said claim the sum of one hundred and ninety-seven thousand one hundred and ninety dollars in gold, which sum, by said allowance, became a debt of the United States, and the said commission made and issued a certificate of their said allowance and award, a copy of which is herewith exhibited, marked Exhibit H and D, No. 2, which certificate is the evidence of said indebtedness, and will entitle the said defendant, at the
17 time fixed by the said treaty of May 8, 1871, to receive the same from the Government of the United States—that is to say, within one year from the 26th day of September, 1873; and these complainants are informed and believe, and so charge the fact to be, that such arrangements have been made between the two governments in accordance with usage in like cases, that the said sum will be paid to the defendant by an agent of the British government in Washington city on or immediately after the 26th day of September, 1874, unless the time and place and mode of payment be changed at the instance of the said defendant; and the complainants say and charge that upon the allowance and award, so as afore-

said made by the said commission, the defendant became indebted and liable to pay to the complainants the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents ($49,297.50) in gold, being an amount equal to one-fourth the sum so as aforesaid allowed on the said claim, and that for the payment of the said amount so due them the complainants had and have a lien upon the said claim, and upon the certificate of the amount allowed thereon, and upon all moneys which are or may become due and payable in respect thereof; and these complainants hoped that the defendants would have promptly paid or arranged with them for the future payment, at some convenient time, of the compensation so due them for their services. But now so it is that the defendant fails and refuses to pay these complainants the said amount of their agreed compensation, or any part thereof, or to make any arrangements for the future payment thereof, though often requested so to do; or to give any satisfactory explanation, excuse or reason for his failure and refusal so to do, but denies the right of these complainants to demand and receive from him the said agreed amount of compensation; and these complainants believe and charge that it is the design and purpose of the said defendant to pay them no part of the said compensation if he can avoid so doing; and these complainants are informed and believe, and charge the fact to be, that on or about the 12th day of August,

A. D. 1874, the said defendant McDonald assigned to the de-
18 fendant, William White, the whole of said award; that the said White, at the time of taking the said assignment, had notice of the claim and lien of these complainants, and took the said assignment subject to their rights; and these complainants further say that on the 15th day of October, 1873, their contract with the said McDonald was filed with the agent of Her Britannic Majesty charged with the payment of said award, and the said White was bound to inquire at said office before taking any assignment of the said award if he desired to secure himself against liability for liens upon it; and these complainants further say that the fund for the payment of said awards is in the hands of the diplomatic representatives of the British government, who are not subject to the powers of this court, and the said fund can be reached and controlled only through the agency of the said McDonald or his assignees, his and their assignments being recognized by the said agents of Her British Majesty's government; and the complainants pray:

1. That the writ of subpœna issue directed to the said defendants, commanding them to appear in this court and answer this bill, not, however, under oath, which is hereby waived, and abide and perform the decree of this court.

2. That they, and each of them, be, by writ of injunction, restrained from assigning, disposing of, receiving or collecting more than the three-fourths of the said award until the further order of this court.

3. That the lien of these complainants upon the said fund, and their interest in the same, be established and decreed by this court.

4. That the said defendant White may be decreed to execute such an assignment as under the rules governing the payment of said award will entitle these complainants to receive their share thereof.

5. That these complainants may have such other and further relief as the nature of their case may require, and to the bourt may seem just.

19 The defendants to this bill are Augustin R. McDonald and William White.

CHAS. E. HOVEY.

J. D. McPHERSON,
Solicitor for Complainants.

DISTRICT OF COLUMBIA, *ss:*

Charles E. Hovey, being duly sworn, deposes and says that he has read the foregoing bill by him signed, and knows the contents thereof; that the facts therein stated of his own knowledge are true, and those stated upon the information of others he believes to be true.

CHAS. E. HOVEY.

Subscribed and sworn to before me this 2d day of October, 1874.

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS, *Ass't Clerk.*

EXHIBIT H. AND D. No. 1.

This agreement, made between Charles E. Hovey, attorney and counsellor at law, in the city of Washington, D. C., and William P. Dole, of Berkeley Springs, West Va., of the first part, and Augustin R. McDonald, of Louisville, State of Kentucky, of the second part, witnesseth, as follows:

Whereas, the party of the second part has a claim against the United States, and which is now pending before the Mixed Commission on British and American Claims under the treaty of May 8, 1871, for the value of 5,000 bales of cotton, more or less, amounting to the sum of two millions of dollars ($2,000,000), more or less, the parties of the first part hereby agree to aid in such manner as may by them be deemed best for the interest of the party of the second part in the prosecution of said claim before said commission or before any department of the Government of the United States, or through any diplomatic negotiations; and, in consideration

20 thereof, the party of the second part hereby agrees to pay to the parties of the first part, or to their order, a sum equal to twenty-five per centum (one-fourth) of the amount which may be allowed on said claim, the payment of which sum is hereby made a lien upon the said claim, and upon any draft, money or evidence of indebtedness which may be paid or issued thereon.

In witness whereof, the party of the second part has hereunto set his hand and seal this — day of June, A. D. eighteen hundred and seventy-three.

(Signed) A. R. McDONALD.

And Gilbert Meyers, of Memphis, State of Tennessee, the attorney of record for claimant, the said A. R. McDonald, in the case named in the foregoing, hereby assents to and approves of this agreement.

(Signed) GILBERT MEYERS.

UNITED STATES OF AMERICA, }
District of West Tennessee. }

On the 11th day of July, 1873, personally came and appeared before me, Isaac Morrison, a United States commissioner, the above-named Augustin R. McDonald and Gilbert Meyers, both to me personally well known, and severally acknowledged that they executed the above and foregoing instruments of writing by them signed, for the uses and purposes therein expressed and set forth.

Given under my hand and official seal, at office in the city of Memphis, in said district, the date above written.

[SEAL.] ISAAC MORRISON,
U. S. Commissioner.

The foregoing contract is accepted.

(Signed) C. E. HOVEY.
W. P. DOLE.

(Signed in duplicate.)

EXHIBIT H. AND D. No. 2.

Office of the Mixed Commission on British and American Claims under the treaty May 8, 1871.

NEWPORT, RHODE ISLAND, *September* 25, 1873.

21 AUGUSTIN R. McDONALD *vs.* THE UNITED STATES. } Nos. 42 and 334.

We award the sum of one hundred and ninety-seven thousand one hundred and ninety dollars to be paid in gold by the Government of the United States to the government of Her Britannic Majesty in respect of the above claim.

(Signed) L. CORTI,
RUSSELL GURNEY,
Commissioners.

EXHIBIT E. No. 2.

Amended Bill.

In the Supreme Court of the District of Columbia, the — Day of April, 1875.

CHARLES E. HOVEY and WILLIAM P. DOLE, Complainants,
vs.
AUGUSTINE R. MCDONALD and WILLIAM WHITE, Defendants.
} In Equity. No. 3937.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainants, with leave of the court first had and obtained, and after having paid into court the costs of suit from the commencement thereof up to the 21st day of April, 1875, inclusive, as appears from the receipt of the clerk of the court hereto annexed, amend their original bill, filed in the above-entitled cause, and thereupon say as follows:

First. The complainant, Charles E. Hovey, is a resident of the District of Columbia, and the complainant, William P. Dole,
22 is a resident and citizen of the State of West Virginia, and in their own right they sue, in their own rights, the defendants, Augustine R. McDonald, who is a subject of Great Britain, and, as complainants have recently learned from the answer of said McDonald filed in this cause, a resident and citizen of the State of Kentucky, and the defendant, William White, who is a resident and citizen of the State of Ohio.

Second. The complainant Hovey was, in the month of June, 1873, as long before the said date he had been, and has since continued to be, an attorney and counsellor at law, engaged as such in the practice of his profession, at the city of Washington, in the District of Columbia. And during the whole of the period that the complainant Hovey was, as such attorney and counsellor at law, so engaged in the practice of his profession, the complainant, William P. Dole, was engaged in the preparation and prosecution, as a solicitor and agent, or as consulting counsel, of private claims against the Government of the United States, before the several executive departments thereof, having by law the cognizance and adjudication of such claims. And by reason of such, their occupation and employment, the complainants, prior to the said month of June, in the year 1873, had had and enjoyed very great experience in the just and lawful prosecution of private claims against the Government aforesaid, and were well qualified, by reason of such, their experience, to properly and intelligently manage and conduct such business in the line of their said occupation and employment as might rightfully be confided to their management and care.

Third. Under the 12th article of the treaty concluded at Wash-

ington on the 8th day of May, 1871, by and between the United States and Great Britain, and commonly known as the treaty of Washington, a commission, whereof the Honorable James S. Frazer, named as commissioner by the President of the United States, the Right Honorable Russell Gurney, named as commissioner by Her Britannic Majesty, and Count Louis Corti, named as com-
23 missioner by the said President and Her said Majesty, conjointly, was organized at the city of Washington, in the District of Columbia, on or about the 26th day of September, 1871. And under the 13th article of the said treaty Robert S. Hale, Esq., was named by the President of the United States, and James M. Carlisle, Esq. was named by Her Britannic Majesty, to attend the said commissioners as the agents and counsel of the respective governments, by whom they were named as aforesaid, to present and support claims on behalf of, to answer all claims made upon, and to represent generally, in all matters connected with the investigation and decision of any such claims, the said governments respectively.

After such its organization, the said commission continued in session for the objects for which, by said treaty, it had been created at Washington aforesaid, from the date last above written to and until about the 10th day of May, 1873, when the said commission for the time being adjourned, and thereafter, to wit, on June 3d, 1873, assembled at Newport, in the State of Rhode Island, where, until its final adjournment, on the 25th day of September, 1873 (the said commissioners being bound by the 14th article of the treaty aforesaid to examine and decide upon every claim within two years from the day of their first meeting), the said commission so continued in such session.

Fourth. On or about the —— day of ——, 1873, and prior to the month of June, 1873, the defendant McDonald, as a subject of Great Britain, had presented to the said commission, through one Gilbert Moyers, his solicitor, under the sanction and approval of the said James M. Carlisle, counsel aforesaid of Her Britannic Majesty, a certain claim against the United States, amounting to about the sum of two millions of dollars, for and on account of the value of about five thousand bales of cotton, which, while the property of the said McDonald, so being such subject of Great Britain, by purchases by him made in the States of Arkansas and Louisiana during the existence of the late civil war, under permits to him duly issued by the
24 proper officers of the United States Treasury, in accordance with the acts of Congress and of the regulations pursuant thereto, made by the Secretary of the Treasury, regulating trade in the States in insurrection, had been entirely destroyed in said States of Arkansas and Louisiana, by certain of the military forces of the United States, under the command and leadership of one General Osborne, in the month of February, 1865. And in respect of the said claim, there had been taken and had been laid before the said commission prior to the month of June, in the year 1873, certain written evidence of a very voluminous character, amounting to

about six thousand pages in royal octavo, when printed in small-pica type.

Fifth. On or about the — day of June, 1873, one William G. Ford, of the city of Memphis and State of Tennessee, came to the said city of Washington, and, as the duly authorized agent in that behalf (and being in fact such agent), as well of the said McDonald as with the approbation and consent, and in behalf of the said McDonald, of the said Moyers, so being such solicitor as aforesaid, proposed and offered to the complainant Hovey to retain and employ him, the said Hovey, in the character and quality of another and further solicitor of the said McDonald, to properly and diligently prosecute and conduct, along with and as the associate and colleague of the said Moyers, as such solicitor aforesaid, the said claim before the said commission, through all the lawful formalities and proper steps requisite to exclude error, and according to the utmost of the proper judgment, skill and endeavor of him, the said Hovey, as might, in respect of such prosecution and conduct of the said claim, appear to the said Hovey most beneficial to the just rights and interests of the said McDonald, upon a contingent compensation to be paid by the said McDonald to the said Hovey and to be measured and adjusted with reference to the amount which might, under such prosecution and conduct of the said claim, be awarded and adjudged in respect of the same to the said McDonald by the said commission.

At the date of such the proposal and offer of the said Ford,
25 as agent aforesaid, to the said Hovey, more than twenty out of the twenty-four months within which the jurisdiction of the said commissioners, under the 14th article of the said treaty, was capable of being exercised had already expired, and a large proportion of the cases brought before the said commission had already been decided, and, in most instances, adversely to the claimants. It was, at the date aforesaid, matter of general knowledge, and well known to the complainants, and in point of fact true that by and through many of their decisions announced and rendered in divers of the said cases so as aforesaid adversely decided by the said commissioners, they, the said commissioners, had recognized and affirmed in substance the application and authority of the following positions:

That a belligerent in the country of an enemy might lawfully destroy any description of property, whether public or private, whereof the possession or control might contribute to the substance of such enemy and to his capacity to prolong the conflict, that the occasion for such destruction and the extent to which it should be carried were the proper subjects of determination by the invading belligerent. That the actual ownership of such property within the country of an enemy by subjects of a neutral power, whether domiciled in such hostile locality or not, conferred upon such property no exemption from liability to destruction, and that the article of cotton within the States of the Union which had been in insurrection was, during the continuance of such insurrection, plainly proper to feel the exercise of such right of destruction, from its relation to the insurrectionary government, as its chief staple and

principal basis of credit. And when the said Hovey read, as he in fact did, the petition which on behalf of the said McDonald, in respect of his claim aforesaid, had been filed with and laid before the said commission (a copy of which said petition the said Ford, as agent aforesaid, at the time of his said offer and proposal, produced and handed to the said Hovey), he, the said Hovey, was unable to see in the nature of the claim in said petition set forth any substantial difference in legal position applicable to the said
26 claim and those which had as aforesaid already been recognized and approved by the said commissioners, and because of such his inability at that time to notice or appreciate any such difference, the said Hovey then and there declined and rejected the said offer and proposal of the said Ford, as such agent, and refused to become connected as counsel or solicitor with the said claim.

Sixth. After such, the declension and refusal of the said offer and proposal by the said Hovey, and on or about the — day of June, 1873, the said Ford still being such agent renewed the said offer and proposal to the said Hovey (and again invited him) to yield and accede to the same, and thereupon the said Hovey undertook and agreed with the said Ford, as agent aforesaid, to examine and consider, with a view to a more mature judgment of the said claim, such abstract or abstracts of the evidence relating thereto, and filed before the said commission as the said Ford, as agent aforesaid, might think proper to furnish to him, the said Hovey, who still, however, declined to review or peruse the said evidence in its entirety, or in its original form, or to become connected with the prosecution and management of the said claim. In pursuance of his desire to secure the professional services of the said Hovey in the lawful prosecution of the said claim before the said commission, the said Ford, as agent aforesaid, thereafter, to wit, on or about the — day of June, 1873, presented and delivered to the said Hovey an extensive abstract of the evidence as to the principal features thereof, relating to the said claim, and filed before the said commission, whereupon the said Hovey diligently examined and considered the said abstract, but, after such examination, still adhered to his original opinion concerning the precedents set by the said commissioners, and applicable to the adjudication of the said claim, and informed the said Ford, as agent aforesaid, that he, the said Hovey, would prefer not to become associated in the prosecution of the said claim upon a compensation which should depend purely upon the success of the said claim before the said commission.

Seventh. Shortly thereafter, in the said month of June,
27 in the year last aforesaid, the said Ford, as agent aforesaid, again appealed to the said Hovey to accept and agree to the said offer and proposal, and to become associated professionally in the proper prosecution, before the said commission, of the said claim, and, thereupon, the said Hovey informed the said Ford, sc being such agent, that the complainant, William P. Dole, had often been consulted in cases of intricacy and difficulty by him, the said Hovey, in the course of his lawful practice as an attorney and counsellor at law; that as the result of such consultations the said

Hovey had learned to place great reliance upon the judgment and sagacity of the said Dole, who, though not by profession a lawyer in the technical sense of that term, had frequently exhibited very high qualifications in dealing with subjects of a legal nature, and that if it was so desired by him, the said Ford, as such agent, he, the said Hovey, would confer with, and take the opinion of, the said Dole upon the said petition and the said abstract, as to the expediency of prosecuting the said claim before the said commission. Whereupon the said Ford, as such agent, expressed great satisfaction at the said information, and earnestly entreated and desired the said Hovey, so, in fact, to confer with, and take the opinion of, the said Dole as aforesaid.

Eighth. Afterwards, on or about the — day of June, 1873, at Berkeley Springs, West Virginia, the said Hovey sought and obtained a conference and interview with the said Dole respecting the said claim, and the said Hovey and the said Dole then and there diligently examined and considered the said petition and the said abstract, discussed the extent and influence of the said positions so as aforesaid recognized and affirmed by the said commissioners, and all the principles upon which, in their judgment, the said claim ought to or might properly be resolved. In the course of such conference and interviews the said Dole expressed the opinion that the said claim was proper to be distinguished from any of its predecessors before the said commission in the material feature
28 that the cotton for the value whereof such claim was advanced had been purchased by the said McDonald under proper permits from the duly authorized officers of the United States Treasury, and though the acts of Congress and the regulations pursuant thereunto made by the Secretary of the Treasury only provided for the licensing of trade in such portions of the States in insurrection as might from time to time be within the lines of military occupancy by the forces of the United States, and though there might be doubt, were the question of fact freely open to proof, whether or not at the time of such purchase by the said McDonald of the said cotton the said States of Arkansas and Louisiana, in which the said cotton was both purchased and destroyed as aforesaid, were actually within the lines of military occupancy by the forces of the United States, yet that before the said commission, and in respect of a claim there advanced against the United States by a subject of Great Britain holding such permit from the proper officers of the United States, the said permit ought justly to be deemed and treated as conclusive and indisputable evidence that the said States of Arkansas and Louisiana, which were embraced in and by the said permit, were at the time of the issuing thereof actually included within the said lines of military occupancy. And the said Dole then and there gave and expressed to the said Hovey the opinion that by reason of such its distinctive features the said claim was not without the prospect of lawful allowance before the said commission, and that if the said Hovey should so determine and desire he, the said Dole, would entertain no objection to assisting him in its due and proper prosecution before the said commis-

sion, in case such assistance should be requested or suggested by the said McDonald or his duly authorized agent in that behalf. And with the view and purpose that the complainants, in the character and quality of other and further solicitors of the said McDonald, should fairly, properly, and diligently prosecute and conduct, along with and as the associates and colleagues of the said Moyers, as such solicitor aforesaid, the said claim before the said commission (or, in case the said claim should lawfully so require, before any proper department of the Govern-
29 ment, or through any proper and lawful diplomatic regulations) through all the lawful formalities and just steps requisite to exclude error, according to the utmost of the proper judgment, skill and endeavor of the said complainants, as might, in respect of such prosecution and conduct of the said claim, appear to the complainants best for the just rights and interests of the said McDonald, and with the further view and purpose, that in consideration of such, the prosecution and conduct of the said claim by the complainants, the said McDonald should, in the event of the allowance of the said claim, pay to the complainants or their order, a sum of money equal in amount to the one-fourth part of the amount which might, at the end of such a prosecution and conduct of the said claim, be allowed in respect thereof, to the said McDonald, which payment aforesaid should stand secured by a lien to the amount thereof in favor of complainants upon any draft, money or evidence of indebtedness which might be paid or issued on said claim, the complainants caused to be written and prepared the certain agreement filed with the original bill brought by complainants in this cause, marked Exhibit H. and D., No. 1, and prayed to be read and referred to now and so often hereafter as may be necessary. And the complainants aver that with reference to such, the views and purposes of the said agreement, the said agreement was framed, written and prepared in substantial conformity to a certain printed form of agreement which during the whole of the said month of June, 1873, was, and long before had been, and has since continued to remain, in general use by attorneys, solicitors and agents engaged in the lawful prosecution of private claims against the United States at the said city of Washington, and which the complainants had themselves in the fair and open prosecution of their business, as mentioned in the second article or paragraph of this bill, frequently and generally employed, a true copy of which said printed form of agreement is hereunto annexed, marked Exhibit H. and D., No. 3, and prayed to be taken as part of this amended bill.

30 Ninth. When the said agreement, marked Exhibit H. and D., No. 1, had been written and prepared as aforesaid, the complainants delivered the same to the said Ford, as agent aforesaid, for transmission and delivery to the said McDonald, to be by him executed, and also to be signed by the said Moyers, as solicitor aforesaid, and when so executed and signed to be returned to the complainants, or to one of them, by the said Ford as agent aforesaid, or by the said McDonald in duplicate on or about the — day

of July, 1873, through the request of the said Ford, as agent aforesaid; the said agreement was in fact signed and executed, in duplicate, by the said McDonald and the said Moyer, and by them acknowledged before a U. S. commissioner, in manner and form, as appears upon the face of said exhibit, marked H. and D., No. 1; and thereafter, to wit, on or about the — day of July, 1873, when so executed, signed and acknowledged, returned and delivered by said Ford, as agent aforesaid, to the said Hovey.

The complainants did not, in said month of July, 1873, themselves sign or execute the said agreement, because they, the complainants, were and are advised that in view of such the purposes and objects of the said agreement and of the consideration whereon, under the terms of said agreement, the undertaking and agreement on the part of the said McDonald, and the assent and approval of the said Moyers, as solicitor aforesaid, were founded and expressed, the obligation and legal duty of the complainants, in respect of so as aforesaid co-operating with the said Moyers in the proper prosecution and conduct of the said claim were fixed of operation of law when the complainants accepted, as before and at the time of, as well as after the execution, signing and acknowledgment of the said agreement by the said McDonald and the said Moyers, as aforesaid, they did in fact and to the knowledge of the said McDonald accept the retainer and employment of them, the complainants, by the said McDonald, in such the said prosecution and conduct of the said claim. But on or about the — day of August, 1873, the complainants, at the special instance and request of the said McDonald, did in fact sign the said agreement in manner and form as appears upon said exhibit, marked H. and D., No. 1 (and so notified the said
31 McDonald), and complainants aver that the said agreement was so, as aforesaid, executed, signed and acknowledged by the said McDonald and by the said Moyers, and so, as aforesaid, signed by complainants, with the views and purposes for which, as aforesaid, the complainants caused the said agreement to be prepared and written, and with no other view, purpose, intention, imagination or design whatever.

Tenth. Immediately after the said — day of July, 1873, the complainants, after such their acceptance as aforesaid of the retainer and employment of the said McDonald, and in the character and quality in fact of the other and further solicitors of the said McDonald, did fairly, properly and diligently prosecute and conduct, along with and as the associates and colleagues of the said Moyers, as such solicitor aforesaid, the said claim before the said commission through all the fair formalities and just steps requisite to exclude error, according to the utmost of the proper judgment, skill and endeavor of the said complainants, as from time to time, in the course of such prosecution and conduct of the said claim, appeared to the complainants best for the just rights and interests of the said McDonald, and did thenceforward and to and until the 25th day of September, 1873, continue such prosecution and conduct of the said claim. And complainants aver that according to the utmost of their proper skill, judgment and endeavor, and because to them, the complain-

ants, such steps seemed requisite and proper in the premises, and most calculated to advance the just rights and interests of the said McDonald in respect of the said claim before the commission, they through themselves jointly or through the said Hovey, acting with the consent and allowance and agreement of the said McDonald, for both the complainants, made with great labor and minute attention, a most thorough and exhaustive study and examination of the whole voluminous record aforesaid, of the said claim before the said commission, both as to the fact and the law and precedents arising thereon, arranged and digested the statutes and de-
32 cisions in the United States applicable to the claim, the opinions of foreign jurists, and the action of the various political departments of European governments in respect to cases of a similar or kindred nature; conferred (through the said Hovey) at Newport aforesaid with the said McDonald, the said Moyers, as solicitor aforesaid, and with the Messrs. Buchanan and Murphy, whom the said McDonald, as his proper solicitors, had also engaged in the lawful and just prosecution of the said claim before the said commission, during a period of about ——, together with them discussed in detail the entire case, and arranged and agreed upon the plan of a certain brief to be laid in support of said claim before the said commission, and did in fact largely contribute to the preparation and production of such a brief, which in fact was of great length and value; and when such brief had been prepared, the same was taken from Newport aforesaid, and carried to Boston, in the State of Massachusetts, and there caused to be printed under the revision of the said Hovey, who thereafter returned with it to Newport and caused it to be laid, by concurrence of said McDonald, the said Moyers, the said Buchanan and Murphy and the said Carlisle, with whom, as counsel aforesaid, the said Hovey had diligently conferred and reasoned respecting the law and the facts of said claim before the said commission; that after the said Hale, as agent aforesaid, had filed before said commission an able and elaborated brief against the allowance of the said claim, the complainants, through the said Hovey, were laboriously engaged in contributing, and did, in fact, largely contribute, to a very full reply in print to such brief of the said Hale: that the said reply dealt with the legal effect of the said permits issued to the said McDonald by the said officers of the United States (in respect whereof the opinion of the said Dole, as hereinbefore mentioned, had been previously announced to said Hovey), and that so much of said reply as so dealt with the legal effect of said permits was the work and production of the said Hovey; that in such the prosecution and conduct of the said claim before the said commission, the said Hovey abandoned for the space of three months together nearly all the residue of his pro-
33 fessional business, which was large and remunerative; that in conferring and reasoning respecting the law and facts of the said case with the said Dole, he, the said Hovey, at his own expense, made numerous journeys from Washington aforesaid and from Newport aforesaid to Berkeley Springs, in the county of Morgan in West Virginia, and from thence to Washington and to New-

port aforesaid; that the said Hovey resided and remained at said city of Boston for the cause aforesaid, at his own expense; and in such the prosecution and conduct of the said claim, by reason of numerous visits to and sojourns at Newport aforesaid, was compelled to and, in fact, did, out of his own private means, and for his personal expenses, expend considerable sums of money; and did, in like manner, pay besides the expenses of clerical assistance in such the said prosecution and conduct of the said claim before the said commission, for and on account of certain references to and translations of German, Spanish, French, Italian and other foreign authorities and precedents in support of the said claim before the said commission, the sum of three thousand dollars. But neither the said Dole nor the said Hovey in person appeared before the said commission, because, under a certain rule or regulation adopted by the same and then well known by the said McDonald, no person other than the agents and counsel aforesaid of the high contracting parties in said treaty mentioned, could or were permitted in person to appear before said commission in advocacy of any claim or interest pending before the same, *at or* under a certain other rule or regulation of said commission, also then well known to the said McDonald, could any person, other than such agents and counsel aforesaid, without the written approval of the same, communicate by writing or in print with said commission in advocacy of any such claim or interest. And complainants, because they did not deem it material for any interest or right of the said McDonald in the said claim, to secure such written approval specially for them, the complainants did not sign or cause to be signed their names to any communication laid before said commission, but merely
34 co-operated in manner and form, as hereinbefore stated, with the said other solicitors of said McDonald and by whom, with the approval of the said Carlisle as agent aforesaid, the said briefs in support of said claim were signed and laid before the said commission.

Eleventh. On the 25th day of September, 1873, there was allowed and awarded by the said commission to the said McDonald, in respect of said claim, the sum of $197,190 in gold. Complainants aver that on behalf of British subjects there had been filed before said commission claims to the aggregate amount of $96,000,000 and being 478 in number, but of which 181, amounting in the aggregate of the awards made thereon to $1,929,819, had been by said commission allowed. That among such claims so filed there had been a large number presented for the value of certain cotton destroyed during the late civil war by the forces of the United States at various localities in the insurrectionary States, but that each and every of the said claims so presented for the value of such cotton (with the exception of the said claim of the said McDonald) had been totally rejected by the unanimous voice of the said commissioners. And the complainants are informed and believe and so aver that the single and exclusive ground and theory upon which the said claim of the said McDonald was in anywise adjudged in his favor by the said commissioners was that the said cotton, for the value whereof said claim

was so as aforesaid presented, had been purchased by said McDonald, then being a subject of Great Britain, under permits from the proper officers of the Treasury of the United States, and that such permits were of themselves controlling evidence in respect of said claim; that the region by them embraced was, at the time the said permits were issued, within the lines of actual military occupancy by the forces of the United States.

And complainants aver that to such the decision of the said commission upon the said claim of the said McDonald, the said services of the complainants in the prosecution and conduct of the said claim, as aforesaid, largely and materially contributed.

35 Twelfth. From the time that the said Hovey began to give his time and attention, as aforesaid, to the prosecution and conduct, as aforesaid, of the said claim before the said commission, the said McDonald was, until the date of the said award rendered upon the said claim, profuse and earnest in his expressions of gratitude and obligation to the complainants for the services which, as aforesaid, mainly through the said Hovey, they had rendered in the said prosecution and conduct of the said claim, and accepted and acknowledged such services as a faithful, just and meritorious discharge of all and every the duties and duty imposed upon the claimants by the said agreement or arising in any manner from their engagement and retainer thereunder.

Thirteenth. Complainants say that said sum of one hundred and ninety-seven thousand one hundred and ninety dollars, by said allowance, became a debt of the United States to Great Britain for the use and behoof of the said McDonald, and the said commission made and issued a certificate of their said allowance and award, a copy of which is herewith exhibited, marked H. and D., No. 2, in the original bill, which certificate was and is the evidence of said indebtedness, and would have entitled the defendant McDonald, at the time fixed by the said treaty of May 8th, 1871, to receive the said amount from the Government of the United States, that is to say, within one year from the 26th day of September, 1873, but for the action had in this cause since the filing of the original bill therein, and but for such action would now entitle him to receive such amount from said Government.

Fourteenth. And these complainants are informed and believe, and so charge the fact to be, that such arrangements had been made between the two governments, in accordance with usage in like cases, that the said sum would, but for such action aforesaid, have been and would now be paid to the defendants, or to one of them, by an agent of the British government in the city of Washington.

36 Fifteenth. And the complainants further say and charge that, upon the allowance and award so as aforesaid, made by the said commission, the defendant McDonald, by reason of the premises, became indebted and liable to pay to the complainants the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold, being an amount equal to one-fourth part of the sum so as aforesaid allowed on the said claim, and that

for the payment of the said amount due them these complainants had and have a lien upon the said claim, and upon the certificate of the amount allowed thereon and upon all moneys which are or may become due and payable in respect thereof. And these complainants hoped that the defendant McDonald would have promptly paid, as arranged with them for the future payment, at some convenient time, of the compensation so due them for their services; but now so it is the defendant McDonald, as well as the said White, fails and refuses to pay these complainants the said amount of their agreed compensation, or any part thereof, or to make any arrangement for the future payment thereof, though often requested so to do, or to give any satisfactory explanation, excuse or reason for their failures or refusal so to do; but each of them denies the right of these complainants to demand and receive from them, or either of them, the said agreed amount of compensation: and these complainants believe and charge that it is the design and purpose of the said defendants to pay them no part of their said compensation if they can avoid so doing.

Sixteenth. And these complainants are informed and believe, and charge the fact to be, that on or about the twelfth day of August, A. D. 1874, the said defendant McDonald, for the purpose of defrauding complainants and others to whom said McDonald was liable, out of their just rights, assigned, but colorably and without consideration and with sinister and fraudulent designs against complainants and others to whom said McDonald was liable, to the defendant,

William White, the whole of said award; that the said
37 White, at the time of taking said assignment, was a party to said fraudulent design and intention, and had moreover notice of the claim and lien of these complainants, and if the said White ever in equity and good conscience took or acquired any valid interest in said assignment, he took the same subject to the rights of complainants under their contract aforesaid and their said lien.

And these complainants further say that, on the 15th day of October, 1873, their said contract with the said McDonald was filed with the agent of Her Britannic Majesty, charged with the payment of said awards; and the said White, if he was not in fact aware of, was bound to inquire at said office of said agent without taking any assignment of the said award if he desired to secure himself against liability for liens upon it.

And these complainants further say that the funds for the payment of said award would, but for such action aforesaid, be and now remain in the hands of the diplomatic representatives of the British government, who are not subject to the process of this court, and the said fund could have been reached and controlled only through the agency of the said defendant McDonald, or his assigns, his and their assignments being, by the wrongful management and connivance of the said defendants, liable to be recognized by the said agents of Her Britannic Majesty's government.

And the complainants, who now here expressly waive an answer from the defendants under oath, pray:

First. That so much of the fund arising out of the award aforesaid as is now, under the order and decree of this court (whereof a copy is filed in this cause) in the hands of the receiver thereof, and applicable to the payment of the said compensation of the complainants, under and by virtue of their said written agreement with the said McDonald, may, by such further order and decree, be continued and held in the hands of such receiver until the final determination of this cause.

Second. That the lien aforesaid of the complainants upon
38 so much of the said fund, or the proceeds thereof, and their interest therein and right to receive the same may be adjudged, ordered and decreed by this court, and

Third. That the complainants may have such other and further relief in the premises as the nature of their case may require, and to the court shall seem meet.

The defendants to this amended bill are:

Augustine R. McDonald and William White.

I do solemnly swear that I am one of the complainants in the foregoing amended bill; that I have read over the same and know the contents thereof; and that the facts stated in said amended bill upon the knowledge of the complainants are true, and that the facts therein stated upon their information and belief I believe to be true.

CHAS. E. HOVEY.

Subscribed and sworn to before me this 27th day of April, 1875.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

BLACKBURN & SELDEN,
Solicitors for Complainants.

Clerk's Office, Supreme Court of the District of Columbia.

CHAS. E. HOVEY *et al.*
vs.
A. R. McDONALD *et al.*
} No. 3937, Docket —.

1875, APRIL 21.

Costs of suit, clerk's costs paid to date, including deposit by complainant, $23.20.

Test:

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

39 EXHIBIT E. No. 3.

Decree Sustaining Demurrer and Dismissing Bill.

In the Supreme Court of the District of Columbia.

CHARLES E. HOVEY and WILLIAM P. DOLE, Complainants, *vs.* AUGUSTINE R. MCDONALD and WILLIAM WHITE, Defendants. } No. 3937, Equity Doc. 14.

This cause came on to be heard upon the demurrer of William White, defendant, and upon the demurrer of Augustine R. McDonald, defendant, to the amended bill of complaint at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is this 24th June, 1875, ordered, adjudged and decreed as follows, to wit, that the demurrer to the said amended bill of complaint be sustained and the bill be dismissed with costs.

By the court.

A. WYLIE.

Filed June 24, 1875.

EXHIBIT E. No. 4.

Mr. Justice Wylie presiding.

Filed June 28, 1875.

CHARLES E. HOVEY *v.* A. R. MCDONALD *et al.* } 3937, Equity Docket 14.

This cause came on to be heard upon the demurrer of William White, defendant, and upon the demurrer of Augustine R.
40 McDonald, defendant, to the bill of complaint at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz., that the demurrer to the said bill of complaint be sustained, and the bill of complaint herein is dismissed at the costs of the plaintiff; and the receiver appointed in this cause, and in Phelps, assignee, *v.* McDonald & White, No. 3910, be directed to pay the funds belonging to said cause to the said defendants, McDonald & White, or order, and thereon said receiver shall be discharged.

ANDREW WYLIE, *Justice.*

EXHIBIT E. No. 5.

Decree of General Term of March 4, 1876, Reversing the Decrees of the Special Term of June 24 and 28, 1875.

In the Supreme Court of the District of Columbia, in General Term, January, 1876.

Filed March 4, 1876. R. J. Meigs.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. MCDONALD and WILLIAM WHITE. } In Equity. No. 3937.

This cause came on to be heard the 27th day of January, A. D. 1876, in the general term of this court, on appeal from the decrees respectively passed in the said cause at the special term of this court on the 24th day of June, A. D. 1875, and on the 28th day of June, A. D. 1875, and was argued by counsel.

41 And thereupon, upon consideration thereof, it is, this fourth day of March, A. D. 1876, ordered, adjudged and decreed that the said decrees be, and they are hereby, reversed, with costs.

And it is further ordered, adjudged and decreed that this cause be, and the same is hereby, remanded to the special term of this court, with leave to the defendants to answer the complainants' bill within the time allowed under the general rule of this court.

D. K. CARTTER,
Chief Justice, &c.

EXHIBIT E No. 6.

Answer of Defendants and Cross-bill.

In the Supreme Court of the District of Columbia.

Filed March 2, 1876. R. J. Meigs.

CHAS. E. HOVEY and WM. P. DOLE, Plaintiffs,
vs.
AUGUSTINE R. MCDONALD and WM. WHITE, Defendants. } No. 3937. In Equity.

Answer of defendants.

These defendants now and at all times hereafter reserving all manner of benefit and advantage to themselves of exceptions to the many errors and insufficiencies in said bill contained, for answer thereto, or unto so much thereof as these defendants are advised it is material for them to answer, answer and say:

1. We admit that the said Chas. E. Hovey is a resident
42 of the District of Columbia. We do not know and cannot set forth whether the said Wm. P. Dole is a resident of the State of West Virginia or not.

2. They deny that it is true that the said complainants, in June, 1873, and for a long time before and after that date were engaged in prosecuting claims against the United States, and in said business had great experience and very considerable success; but, on the contrary, they insist that it is true that the said plaintiff, Wm. P. Dole (then and now unknown to the defendants), was never a member of the legal profession, and that he has never been engaged in the business of prosecuting claims as a profession, and that during the whole time that said complainants pretend that they rendered services for the above-named defendant, Augustine R. McDonald, in and about his claims before the said commission, the above-named complainant, William P. Dole, as defendants are informed and believe it to be true, and thereupon charge the fact to be, was wholly incapacitated from rendering any useful services whatever for the said McDonald by reason of his feeble mental and physical condition caused by habitual and excessive use of intoxicating liquors; and that during all the time last aforesaid the said Dole was under the guardianship of friends *de facto* either in the city of Washington, in the District of Columbia, or the said town of Berkeley Springs, and that the said Dole from the cause aforesaid was unable to attend to his own private business properly, or to the business of any one, of all which facts the complainant, Hovey, had full knowledge, and the defendants were entirely ignorant until during the year 1874. Defendants admit that the said McDonald is a subject of Great Britain, but for many years past has resided in the United States.

3. Defendants admit that under the 12th article of the treaty of the United States and Great Britain, concluded at Washington on the 8th day of May, A. D. 1871, a commission had been organized and assembled at Washington in September of that year to
43 examine and decide upon claims presented by the subjects of Great Britain against the Government of the United States.

4. Defendants admit that the said Augustine R. McDonald, having a claim against the Government of the United States amounting to about two millions of dollars, for indemnification for the burning by troops of the United States engaged in suppressing the rebellion of certain large quantities of cotton, the property of said defendant McDonald, in certain places in the insurrectionary States, had presented his claim to the said commission, and had proceeded in the prosecution thereof, and prior to the month of June, 1873, certain written evidence of a very voluminous character had been taken and laid before the said commission, but the defendants say that the said evidence was taken under the direction of the defendant McDonald's sole attorney of record, Gilbert Moyers, and established the fact to the satisfaction of the said commission that the

said cotton was destroyed within the lines occupied by the troops of the United States.

5. Defendants deny that one William G. Ford was the duly authorized agent of the said defendant McDonald to retain and employ the said complainant Hovey in the character and quality of another and further solicitor of the said defendant McDonald to properly and diligently prosecute and conduct, along with and as the associate and colleague of the said Moyers, as such solicitor aforesaid, the said claim before said commission, or that the said Moyers had power to consent to such employment of said Hovey, or that he did so consent, or that the said defendant McDonald ever employed the said Hovey. They deny that the said Ford ever acted as the agent of said defendant McDonald or was ever authorized so to act.

6. The defendants have no knowledge nor any information upon which to found a belief as to the truth of the matter stated in the sixth paragraph of complainants' bill, except they say that if said proposal, declination and refusal, and renewed proposals between the said Ford and the said Hovey took place as therein
44 stated, they were unauthorized by and unknown to the defendant McDonald, and the said Ford did not act therein as his agent.

7. The defendants have no knowledge as to the truth of the matter stated in the seventh paragraph of said complainants' bill, except as to the alleged agency of said Ford; but they deny that said Ford was authorized to do any act therein mentioned as done by him as the agent of said McDonald, and the said Dole had, as alleged in said paragraph, "frequently exhibited very high qualifications in dealing with subjects of a legal nature," and they say that the said Dole was, at the time mentioned, utterly incapable of understanding the simplest legal proposition, or to advise regarding the management of said claim.

8. The defendants say that they have no knowledge or information concerning the alleged conference and interview in June, 1873, between the said Hovey and the said Dole, as stated in the eighth paragraph of said bill; but they deny that, if said conference did actually take place, that it was by the authority or procurement of the defendants, or either of them, or that they, or either of them, authorized the preparation of the paper therein mentioned, and marked "Exhibit H. and D., No. 1," of said bill of complaint; and defendants deny that the said paper was framed, written and prepared in substantial conformity to a certain printed form of agreement then, before and since in general use by attorneys, solicitors and agents engaged in the lawful prosecution of private claims against the United States at the said city of Washington, and which the complainants had themselves, in the fair and open prosecution of their business, frequently and generally employed; and they say that, long before said date mentioned, the commission had decided affirmatively the sufficiency of the said memorial.

9. The defendants have no knowledge nor information as to the delivery of the said form of agreement to the said Ford, as stated

in the ninth paragraph of said bill, but they deny that the said Ford was authorized to, or did, receive the same as their
45 agent, or the agent of either of them, or that the said agreement was in fact signed or executed by the said McDonald, except under the circumstances and for the purposes hereinafter stated; and they deny that the said McDonald was ever informed, or had knowledge, that the said complainants accepted any retainer and employment from him in the prosecution and conduct of said claim; and they deny that, on or about the — day of August, 1873, or at any other time, the complainants, at the special instance and request of the said McDonald, did in fact sign the said agreement, or that they notified the said McDonald of the said signature.

10. And defendants deny that any services were ever rendered by the said complainants in the prosecution of said claim under any retainer and employment by the said McDonald, or in the character and quality of other and further solicitors of the said McDonald, or that they ever performed any labor about the preparation or presentation of said claim, except for the advancement of their own interest in other cases then pending before the said commission, as hereinafter more fully stated; and they say that they have no information as to the visits of the said Hovey to the said Dole, and the expenses attending the same; but the said visits and expenditures, if incurred, as in said tenth paragraph of the bill alleged, were not authorized by the said defendants, or either of them, and were not made in the interest of either of said defendants; and they deny that the visits and sojourns of said Hovey at Newport were authorized by, or in the interest of, the said defendants, or either of them, or that the expenses of clerical assistants, as stated in said paragraph, were on account of, or authorized by, either of said defendants; and they have no knowledge whether any such expenditures were ever made by said Hovey for any purpose whatever, expressly denying, however, that they were made in the prosecution of the claim of the said McDonald, or that the said complainants co-operated with the other solicitors of the said McDonald; and defendants say said claimants were interested in many other cases then pending.

46 11. The said defendants deny that on the 25th day of September, 1873, there was allowed and awarded by the said commission to the said McDonald, in respect to the said claim, the sum of $197,190, in gold. But they say that the said commissioners made the award of the above-mentioned sum, to be paid in gold by the Government of the United States to the government of Her Britannic Majesty in respect of the above claim.

And the defendants say that they have no knowledge or information of the ground and theory upon which the said award was made by the said commissioners; and they deny that the complainants in any way contributed to procure the said award.

12. The defendants deny that the said McDonald admitted that the complainants, or either of them, had rendered any services in the prosecution and conduct of the said claim.

13. The defendants deny that by said allowance the amount

thereof became a debt of the United States to Great Britain for the use and behoof of the said McDonald, or that the certificate which was issued therefor would have entitled the said McDonald to receive the said amount from the Government of the United States.

14. The defendants deny that such arrangements had been made between the two governments that the said sum would, but for the action had in this case since the filing of the original bill herein, and but for such action, have been paid to the defendants or to one of them by an agent of the British government in the city of Washington.

15. And the defendants deny that the said defendants, or either of them, became indebted and liable to pay to the complainants the sum of $49,297.56 in gold, and that for the payment of the said amount so due them, these complainants have and had a lien upon the said claim and upon the certificate of the amount allowed thereon, and upon all moneys which may become due or payable in respect thereto, and they admit that each of them deny
47 the right of these complainants to demand and receive from them, or either of them, the said sum or any sum whatever; and they say that they have informed the said complainants and aver the fact to be true that they, the said complainants, were never employed by the said McDonald; that they had never rendered him any service, that he executed no contract with them, and that he was not indebted to them, and that neither of the said defendants was indebted to them in any sum whatever, and they refuse, therefore, to make any payment.

16. The defendants admit that on or about the 12th day of August, A. D. 1874, the said defendant McDonald assigned to the said defendant, William White, the whole of said award, but deny that it is true that it was for the purpose of defrauding the complainants, or others to whom said McDonald was liable, out of their just rights, or that said assignment was colorable and without consideration and with sinister and fraudulent designs against complainants and others to whom the said McDonald was liable; and they deny that it is true that the said complainants had any lien or claim on the said award at the time of said assignment or at any other time whatever.

These defendants deny that it is true that the said White took said awards subject to any rights of said complainants whatever.

Defendants do not know and therefore cannot set forth that the said complainants, on the 15th day of October, 1873, filed their pretended contract, marked "Exhibit H. and D., No. 1," of said bill of complaint, with the agent of Her Britannic Majesty charged with the payment of said awards, but defendants deny that it is true that the said defendant White was bound to inquire at said office before taking any assignment of the said award in order to secure himself against liability for liens upon it, but on the contrary, said defendant insists that the said agent of Her Britannic Majesty kept no record in regard to any liens or claims against any awards made by said commission by which any person whomsoever is bound.

generally discouraging the said McDonald over the prospect in his claim, especially on account of the magnitude thereof; that these conversations were continued while taking depositions at the line between the State of Arkansas and the State of Louisiana and at the town of Bastrop in said last-mentioned State; that said Moyers returned to Memphis, and the defendant McDonald continued with the local attorneys, taking depositions until some time in March when the said McDonald and the said Moyers met at Vicksburg and proceeded together to Lake Village, Arkansas, where the same complaints were again renewed against the commissioners by said Moyers for the purpose last aforesaid, and he informed the said McDonald that the Government of the United States had arranged with the Italian commissioner, who, he said, acted as umpire, that the aggregate of the awards rendered against the United States should be less than $2,000,000, and he declares that in fact out of the large number of claims pending before said commission, aggregating $96,000,000, a very small proportion not exceeding a few hundred thousand dollars had been allowed. And the defendants say that the purpose and effect of these conversations were to discourage the defendant McDonald about the prosecution of his claim, and he was inclined to abandon the cross-examination of the witnesses for the Government, but the said Moyers advised that he should still proceed with the examination, making, however, the expenses and local attorney's fees contingent on the final recovery, and expressing the hope that the smallness of the awards so far made and the injustice done towards British subjects would attract the attention of the newspaper press of the country and excite criticism and induce the commissioners to act more justly and liberally towards claimants. The defendants further say that said McDonald returned to Memphis about the end of April and there met said Moyers who informed said defendant that said Wm. G. Ford, who was then unknown to said McDonald, but who said Moyers declared was a client of his and had a claim before the said mixed commission, was at that time engaged in the city of
52 Washington in finding out the true condition of the matters pending before said mixed commission; that said Ford was a man of high character and great skill and could be implicitly relied upon. That again about June 1st, 1873, said McDonald met said Moyers in Memphis and was informed by him that important news was expected from Ford. But the said defendant having been informed by Mr. Howard, who was the agent of the British government before said commission, and advised by him to avoid any large expenditures of money in his case, felt inclined to abandon any further active prosecution thereof; but the said Moyers urged the said McDonald to proceed to Arkansas and take further evidence. This he accordingly did, but limited the examination to such witnesses as were produced, and whose expenses were borne by other persons who so produced them in support of their own testimony. And defendants further say that while said McDonald was engaged in taking evidence, to wit, about the middle of June, in Ashley county, Arkansas, he received a letter from said Moyers

stating that good news had been received from Ford at Washington, but not proper, from its confidential character, to state on paper, and the said Moyers urged the said McDonald to secure all testimony he could discover to sustain his claim on all vital points, and requesting that the letter should be destroyed, which was done, after exhibiting the same to the local counsel and other friends; that thereafter, about the 1st of July, the said McDonald returned to Memphis, when said Moyers informed him that his client, Ford, had succeeded in effecting an arrangement that secured to him, the said Ford, an award in his own case beyond any doubt, and that the only prospect of securing justice before said commission was by making a like arrangement in regard to the McDonald claim; that said Ford had spent considerable time at Washington, and by the exercise of great skill and perseverance had penetrated the secrets of said commission, and had discovered that said commissioners had been careful not to pass upon many claims for large amounts; that the commissioners on behalf of the United States, and the agent and the attorney for the United States, practically controlled the
53 commission, through the influence obtained by the Government of the United States over the umpire; that the business pending before the commissioners was so shaped that a number of large claims was still undetermined; that the apprehensions of the public being allayed by the small awards theretofore made, it was now felt, by the American commissioner, that he could safely arrange in one or two large cases to permit considerable sums to be awarded, and that he would do so in any case where a sufficient compensation was secured to said commissioner; that the claim of his client Ford was a small one, and said Ford only secured the promise of a favorable consideration on condition he effected such an arrangement in some large claim pending; that the choice was now between a claim entitled the Calderwood case, in which some $3,000,000 were sought to be recovered, and the pending claim of the defendant McDonald, and that whichever case was selected the other case would be rejected, and a full award made in the selected case. The said Moyers then and there stated that he had been informed by the said Ford that the American commissioner had expressed a preference for the McDonald case, because the cottons therein claimed for had been purchased under permits from the United States authorities, and the transactions sanctioned by the autograph letter of Mr. Lincoln, and, therefore, the public would be better satisfied, and the commissioner himself, feeling a deep veneration for Mr. Lincoln, preferred to approve of his official action and rest the award upon that ground in part. And defendants say that thereupon the paper, a copy of which is filed with the bill of complaint, marked H. and D., No. 1, was presented to said defendant McDonald for his signature, there already being endorsed upon the same, "The foregoing contract is accepted. C. E. Hovey, Wm. P. Dole;" but the said defendant stated to said Moyers that he regarded the American commissioner as a gentleman of high character and pure reputation, and he could not believe he was any party to such an arrangement, and he refused to execute said con-

And the defendants insist that it is true that at the time
48 said pretended contract was filed as aforesaid the said agent had not received the said money, nor entered upon the discharge of his duties.

And the defendants say that the said assignment to said defendant White was in good faith and without notice of any just claim against said award and lien thereon and was for value received.

And the defendants further say by way of answer to the said bill of complaint that in the presentation and prosecution of the said claim the said defendant McDonald had employed one Gilbert Moyers as his sole attorney and had agreed to pay the said Moyers for his services as said attorney, and for certain expenses to be paid by him in the prosecution of said claim, the said Moyers was to receive a sum equal to one-half of about 60 per cent. of the award that might be made by said commission; the sum of $100,000 being, however, deducted from the amount so coming to said attorney to reimburse said McDonald for expenses already at that time incurred; that on or about the 28th day of December, 1872, the said Moyers, not content with the compensation provided under his said contract, entered into a conspiracy with and between the said Charles E. Hovey and Wm. P. Dole, complainants in this bill, and one William G. Ford and Charles Adolph, commonly called Marquis de Chambrun, which conspiracy was among them there first thereof had, to maliciously aggrieve and impoverish the said McDonald, and in pursuance of said conspiracy, on or about the day last mentioned and at divers dates thereafter, as hereinafter set forth, said parties made the following representations to the said McDonald:

1st. That said complainant Hovey was the junior law partner of the Hon. Jeremiah Black, of the State of Pennsylvania, and that the execution of a certain contract with said complainants Hovey and Dole, a copy of which is filed with said bill of complaint, marked Exhibit H. and D., No. 1, would entitle the said McDonald
49 to the professional services of said Black in the prosecution of said claim before said commission, and that by reason of the relation which it was claimed existed between the said complainant Dole and one of the members of said commission, the said Black would be permitted to make personal argument before said commission in the prosecution of said claim; that the said Black refused from motives of policy to contract, except in name of said Hovey, in claims of this nature, but that he was in the habit of making such contracts in the name of said Hovey, which representations the said McDonald believed to be true; whereas, in truth and in fact, the said Hovey was not a law partner of said Black, nor was he authorized to contract for the services of said Black, nor had he ever so contracted by the authority of said Black, nor would the execution of said contract entitle said McDonald to the legal services of said Black, all which was well known to the said parties making said representations, and the defendants say that the said Black never rendered any services in the prosecution of said claim.

2d. That the said complainant Dole (then and now unknown to

the defendants) was an experienced, successful and distinguished lawyer, lately practicing in the city of Washington, at present residing at Berkeley Springs, W. Va., a man of great influence, by reason of his social and political associations and family connections, being a brother-in-law of one of the members of said mixed commission, and his opinion would have great weight with said commission, and that none of said parties to said contract were to take employment in any other pending claims, which representations and promises were believed by the said McDonald to be true, whereas, in fact, said complainant Dole was not, and never had been, an attorney-at-law, nor had he practiced in said city of Washington, but was wholly inexperienced in the legal prosecution of claims or management of suits, and without influence, family, professional, social, or political, and was not related in any degree to either of the members of said commission; and, in fact, at the time said representations were made, and during the future pendency of said suit, the said Dole was, by reason of the long-continued
50 use of intoxicating liquors to excess, wholly incapacitated from rendering any service of value to the said McDonald in prosecuting his said claim, all which facts were well known to the parties making said representations, nor did said Dole, at any time, render such service, nor appear, nor offer to appear, in the prosecution of said claim, and all said parties except said Black, as defendants are informed and therefore charge, did accept employments in other pending claims before said commission.

3d. That the execution of said contract by the said McDonald would secure the active aid of a gentleman of standing and influence in the city of Washington, and who was connected by marriage with one of the members of said commission, and defendants say that, in point of fact, the said Dole did induce the said relative of one of said commissioners to address a letter to said commissioner soliciting information in regard to said claim, which letter was written, as said McDonald is informed and believes, pending negotiations to induce him to sign said contract, and, although written by the relative of said commissioner in good faith, and with no improper motive, yet he believes it had the effect to excite in the mind of said commissioner unjust suspicions against his claim. Defendants say that they had no knowledge, at the time, of the writing of said letter, nor was it done by their procurement or consent.

4th. And the defendants further say that about the 28th of December, 1872, the said defendant McDonald and the said Moyers, as his attorney, were engaged in taking testimony in proof of said claim pending before said mixed commission, and continued together so engaged until about the 20th of January, 1873, and while at Memphis, Tennessee, so engaged said Moyers for the purpose of preparing the mind of said McDonald to be brought under the control of the said conspiracy then in contemplation, spoke frequently of what he called the injustice of the mixed commission towards British subjects, and expressed his regret at having taken any cases before that commission, expressing apprehensions that he would not re-
51 ceive fees sufficient even to pay his travelling expenses, and

tract. Thereupon said Moyers called the attention of said
54 McDonald to the statement which he asserted was true, that an aggregate of $70,000,000 of claims had been passed upon, and that only about $1,000,000 in amount had been allowed, and that the fate of this claim could be readily anticipated; that it was simply a question whether an award of $2,000,000 should be made, which amount he was in a position to guarantee would be allowed, or whether the claim should be rejected, and the claimant disgraced as presenting a fraudulent claim and an award thereupon made in the Calderwood case; that the said complainant Dole and another gentleman, also a brother-in-law of the American commissioner, with said Hovey, would become interested in the Calderwood case, and unless this contract so presented was executed, which would give them each an interest in the Macdonald case, they would press the Calderwood case for an award; but if this contract was signed they would not become interested in any other case, but would devote themselves only to the allowance of the McDonald case; that said complainant Dole was a man of great wealth, and mainly desired to secure a large sum of money for his relative the commissioner and his other brother-in-law, who would aid him in controlling the commissioner; and that all negotiations were made through these two relatives by marriage of the commissioner; that the division was to be made on the twenty-five per cent. of the $2,000,000 as follows: $100,000 each to the said commissioner and his brothers-in-law, and the remaining $200,000 to the said Black and said complainant Hovey, and as a reason for the large per cent. demanded, it was stated that the said complainant Dole and his friend, the other brother-in-law of the American commissioner, would take cottages at Newport, where the mixed commission was in session at that point, and would bring their families, and that the family of the American commissioner would be invited there, and surrounded by these influences.

5th. And the defendants say that the said defendant McDonald, still refusing to sign the said paper presented, went to the city of New Orleans, returning to the city of Memphis about the 9th of July, and there, at the request of said Moyers he was intro-
55 duced by him to said Ford, said Moyers stating that said Ford could give fuller and more direct information. The said defendant McDonald thereupon walked with said Ford to the office of the latter, and repeating the statements made by Moyers, asked said Ford if they were true. The said Ford thereupon stated that they were true, and that unless the said McDonald went into this arrangement he would receive nothing; that the award of $2,000,000 rested between the Calderwood case and the McDonald case, and the election rested with said McDonald, and he could not see why there was any hesitation; that the said Ford had spent weeks in Washington, and discovered that only through such an arrangement could any case of any magnitude be passed; that he only secured his own case by perfecting an arrangement of this nature in some other large case; that the said Moyers desired him to take the Brown and McBain cases then pending before said commission,

but he would only select between the Calderwood case and the McDonald case, and would only take one case, as the friends of the American commissioner desired to avoid criticism.

6th. And defendants say that on defendant McDonald's return to the office of said Moyers he was informed by said Moyers that the Hon. Robert S. Hale, the agent and counsel for the United States before said commission, had determined to ask from said commission an extension of time in the McDonald case in order to introduce surrebuttal testimony, which permission had not been previously allowed in any case, and the result would be, if such permission were accorded in this case, either the time yet unconsumed by the commission would be exhausted and the commission expire without determining the case, or no opportunity would be given to answer the testimony thus taken; and that, unless this extension of time could be avoided, it would result fatally to the claim, and this could only be done by at once closing this contract, so that the friends of the American commissioner could be at once informed and an extension of time avoided through his influence.

Thereupon the said defendant McDonald inquired of the said
56 Moyers whether the said Ford would have any pecuniary interest in this contract that might influence his statements through personal interest, but the said Moyers declared that the only interest that said Ford had was the preference already expressed for the McDonald case by the friends of the American commissioner by reason of the permits aforesaid, and that he, said Ford, had been sent by said complainant Hovey to effect this arrangement, so that his own little case could float in by the side of a larger case. Upon the said defendant McDonald still hesitating to sign said paper, the said Moyers inquired of him: "Can you not trust your own attorney; all I want is to secure your interest." Thereupon the said McDonald informed the said Moyers that, while he trusted him, yet he, said attorney, might be imposed upon, and if he, McDonald, signed his name and only received a small award, these men could claim one-quarter of the entire amount, and that he did not want to make any arrangement until he saw Mr. Howard, the agent of the British government, and laid the facts before him and asked his advice. To this, however, the said Moyers objected, declaring that the said Howard would place the facts before the British government and would thus end at once all attempts to execute the treaty through this commission, and that he, said McDonald, must be guided by his advice, and that unless he executed the paper, he, Moyers, would not proceed further with the taking of the testimony in the case and would not go to Newport to attend the sessions of the mixed commission and would spend no more time with the case. Upon McDonald's still refusing, the said Moyers proposed that the paper should be executed and left with him, not to be delivered up to the said complainants until an award of $2,000,000 was made, and he, said McDonald, was satisfied that all that had been represented was, in fact, true, and should thereupon give his written consent to the delivery of the paper.

7th. And the defendants say that upon said proposal being made

by said Moyers, the said McDonald did sign his name to the said paper upon the terms proposed, leaving it with said Moyers
57 as an escrow, believing that said Moyers was acting only as his attorney and had no interest in said proposed contract, and would hold the said paper subject to his order, and not deliver the same to the said complainants, Hovey and Dole, until an award of $2,000,000 was made and until the said McDonald was satisfied that all the representations that had been made to him were true, and should give his written consent to deliver the same. And defendants say that although said McDonald did not fully believe the representations made as to the purposes of any of said commissioners, yet his mind was in a state of doubt and indecision, and he was unable to act with proper judgment, owing to the influence of his counsel over him and the effect of these representations upon him, and the threat that said Moyers would not proceed with his claim before said commission, and that in this state of indecision and to avoid the importunities aforesaid, and secure time for reflection, and for the purpose of inducing said Moyers to proceed in the preparation and presentation of his claim and to prevent an extension of time for the examination of witnesses that might render impossible the consideration of his claim, and reserving to himself the right of free action in regard to the said paper in the future, he affixed his name to said paper.

8th. And the defendants further say that the said McDonald, immediately after having signed the said paper, started for the city of Louisville, Kentucky, and on the way, considering the matter maturely, concluded that he had acted imprudently in signing the paper and leaving it in the possession of the said Moyers, although subject to the conditions aforesaid, and on reaching the said city of Louisville, to wit, about the 13th of July thereafter, he wrote a letter to the said Moyers directing him to return the paper to him, the said McDonald, but to this he received no answer.

9th. And defendants further say that a few days thereafter the said McDonald proceeded to the city of Cincinnati, Ohio, and from there again wrote to the said Moyers calling for the cancella-
58 tion of his said signature and the return of said paper, to which the said Moyers replied by letter, declining to return the said paper, in offensive terms.

10th. And defendants further say that about the beginning of August thereafter the said McDonald went to the city of Newport, Rhode Island, to attend the sessions of the mixed commission, and called upon Mr. Carlisle, the attorney for the British government, and inquired of him if Mr. Hale, the attorney for the Government of the United States, possessed and exercised any undue influence over the members of the mixed commission, and was informed, in answer, that although the commissioners had, the speaker thought, committed errors in rendering their decisions and the awards had been very small in amount, yet he thought no undue influence had been exerted; that thereupon the said McDonald called upon Mr. Howard, the agent of the British government, to learn from him why the awards were so few and so small in amount, and he was

informed that in many cases the claims were rejected because they had been presented previously in the Court of Claims and in prize courts; that claims for property destroyed had not been allowed, but as the property for the destruction of which the claim of the said McDonald was made had been purchased under permits from the Government of the United States, these permits might be treated as an estoppel against the United States, the said Howard indicating by his answers no suspicion on his mind of any unfair practices in the decision of claims, but he informed the said McDonald that Mr. Hale had obtained permission to examine witnesses in surrebuttal in the matter of the claim of said McDonald, of which fact the said McDonald informed the said Moyers upon the arrival of the latter at Newport, pointing out to him that the signature to the paper (marked "Exhibit H. and D., No. 1" of this complaint) had not prevented the granting of this permission, and declaring his belief that the whole proceeding in regard to said paper was on the part of said complainants, Hovey and Dole, and the said Ford, a conspiracy to defraud him, the said McDonald;

59 that to this declaration the said Moyers answered that since the said McDonald was in Memphis, the said Moyers had satisfied himself that the whole thing was a fraud, that he did not leave the said paper with him, but that he either had or would cancel the same, and that he doubted the actual existence of any such person as the complainant Dole, but that it were better to be civil to the said Hovey and the said Ford as they might have power to injure if they could not benefit; that they had pretended that the McDonald claim was among the cases under their management and had used this means to secure the control of other cases, and it would only excite ill will if he, McDonald, stated that the agreement had been cancelled; that said Hovey with others had formed a ring with parties interested in other cases, the claims in which amounted to about $11,000,000, and that they were then lobbying with the umpire to secure his vote and influence; that as he, Moyers, had lost confidence in both the McBain and the Brown case (claims then pending before said commission), he was willing to put them into this ring.

11th. And defendants say that thereafter upon meeting the said Ford at Newport, the said McDonald stated to him that he regarded the whole negotiation of said contract as a fraud, and that he doubted the existence of the said Dole, as he had never seen him, nor was he then present at Newport; that thereupon the said Ford replied that he, said McDonald, would yet regret that he had not stayed in their boat, and that he would send him a man who stood high in diplomatic circles, and who understood all the movements regarding this commission, and whose statement could not be questioned, and accordingly a day or two later the said McDonald received a dispatch from Jersey City from said Ford requesting him to meet the Marquis de Chambrun at the Ocean house, Newport, that night; that the said McDonald being unacquainted with the said Marquis, and, proceeding towards the Ocean house, met a gentleman, who inquiring of the said McDonald for

the boarding-house of O. and K. Johnson, where said Mc-
60 Donald resided, the acquaintance was then formed, the said Marquis stating that he was then on his way to call upon the said McDonald; that in the conversation then following the said Marquis repeated all the statements theretofore made by the said Moyers and the said Ford, as to the extraordinary means necessary to be used in the prosecution of claims before said mixed commission, and in the conversation then had or in conversations shortly following the same, the said Marquis stated that the Secretary of State of the United States had dined and wined the Italian member of the commission, and had obtained entire control of him, and that if the Hon. Bancroft Davis, then in Washington, knew of the presence of the said Marquis at Newport he would at once divine his object and come to Newport to counteract his influence; that he expected to control the umpire by other means, but must make a show of precedents, and therefore desired to print in the brief of said McDonald some Mexican precedents and continental authorities prepared for the Calderwood case; that as there were questions of citizenship in the Calderwood and Forbes cases, if the citizenship should be held adversely, the precedents might not be read, but no question of this nature being in the McDonald case, the precedents would be considered, and while they could not injure that claim, would favor the decision in other cases; that the said McDonald would yet discover that he was making an error in not continuing with them in interest; that there were parties in Europe operating to influence the Italian commissioner; that the Italian ambassador at Paris was among the number, also a relative by marriage of the said Marquis, and that persons in London having influence with Lord Granville were inducing him to communicate with Victor Emanuel, intimating to him that the course of the Italian representative was distasteful to the British government; and the said Marquis further stated that in a few days the said representative would receive a mission from his home government, informing him that he must enlarge future awards, and must also allow for the destruction of property, and thus establish a precedent for
the allowance of claims to be thereafter made by Italian
61 citizens upon the American Government; that he was then in negotiation with the Italian minister at Paris to secure his presence here, that he might exercise a personal influence over the Italian commissioner, but that the expenses would involve some fifteen thousand francs or dollars, but that at all events the said ambassador had already sent a work written by himself on international law, which plainly set forth the rule that the destruction of the property of a neutral should be compensated for, and that the presentation of this book to the commissioner was accompanied by a letter from the author, insisting upon this rule of decision, that the influence used by the Secretary of State of the United States, over the Italian commissioner was not a money influence, but a promise that after the close of the commission the President of the United States would write a highly complimentary letter to Victor Emanuel, which would aid in securing for the

Italian commissioner the appointment as ambassador to the Court of St. James; that the ambassador of the French government to the United States was, at the date of one of these conversations, present in Newport, attempting to assist the said Marquis, under the supposition that he, the said Marquis, was acting simply in the interest of the claims of French citizens, to be presented in the future, in securing the recognition of the rule that payment should be made for the property of a neutral destroyed; that the decision of these claims before the commission was a contest of diplomacy, in which the private rights of the claimants were imperiled to accomplish political results. And the defendants say that the result of these representations and the assurances that the citations of the precedents aforesaid in the brief of the said McDonald could work no injury to the claim of the latter was that the said McDonald assentend to the printing of said precedents as an appendix to the brief in his case; that the said consent was given solely at the solicitations of and for the benefit of said complainants, said Marquis, said Ford, and said Moyers, who, he was informed, were all interested in other claims pending before said commission
62 and which it was hoped would be favorably affected by these authorities, and that these are the services set forth at length in the tenth paragraph of said bill of complaint, and more particularly described in the averment that the said Hovey "did in like manner pay, besides the expenses of clerical assistance in such the said prosecution and conduct of the said claim before the said commission, for and on account of certain references to and translations of German, Spanish, French, Italian, and other foreign authorities and precedents in support of the said claim before the said commission, the sum of three thousand dollars."

12th. And defendants further say that upon the — day of September thereafter, the said McDonald being in the city of Washington, met the said complainant Hovey and, being desirous to learn the full extent of the fraud practiced upon him and whether the said Dole was but a myth, informed the said Hovey that he was then on his way to Berkeley Springs, West Va., and thought he would call on said Dole, whereupon the said Hovey, with some agitation, warned the said McDonald not to do so, as it would ruin the reputation of the American commissioner to have claimants visiting and interviewing his brother-in-law; that upon subsequently meeting the said Hovey in Newport he frequently informed the said McDonald that no claims could be allowed except through them, the said complainants, and the said Marquis and said Ford; that what was called the Columbia cases, from South Carolina, had been rejected because the agents for said cases had failed to carry out the arrangements they had made with them; that arguments and briefs were of little or no value unless in connection with the influences brought to bear upon and the negotiations made with members of the commission.

13th. And defendants say that after the allowance made by the commissioners which was in these words:

"Office of the Mixed Commission on British and American Claims under the treaty May 8th, 1871.

NEWPORT, RHODE ISLAND, *September 25th*, 1873.

63 AUGUSTINE R. McDONALD *vs.* THE UNITED STATES. } Nos. 42 and 334.

We award the sum of one hundred and ninety-seven thousand one hundred and ninety dollars, to be paid in gold, by the Government of the United States to the government of Her Britannic Majesty, in respect of the above claim.

(Signed) L. CORTI,
RUSSELL GURNEY,
Commissioners."

which award was not signed or approved by the American commissioner; the said complainant Hovey called upon the said defendant McDonald in the city of Brooklyn, New York, and stated that the said award had been secured through the influence exerted and the arrangements made as hereinbefore set out; that the umpire had, at the last moment, backed out of the arrangement, except as to the McDonald case, and had rejected all other claims for property destroyed, and had made this case stand as the only precedent for the payment to neutrals under such circumstances, and he insisted that the said McDonald should call immediately at the Astor house, in the city of New York, and "see the boys," who, he stated, in answer to an interrogatory, were the said Moyers, Ford, the Marquis and himself, as they would have to make a payment to the said umpire in that case; that thereupon the said McDonald refused the said interview, but being present at the said Astor house a few days thereafter, intending to see parties other than those above named, he accidentally met the Marquis and was urged by him never to disclose the fact that they, the said parties, had "lobbied" with any member of the mixed commission, stating that if such fact became public Congress would refuse to make an appropriation to pay the said award; that thereafter the said McDonald met the said Moyers at the place last aforesaid, who strongly urged the said McDonald to compromise the claim which is now in suit,

64 stating that he never intended to deliver the paper, but that Ford, being a client of said Moyers, had obtained access to his papers and secured this contract, and he advised the said McDonald to pay the said Hovey the sum of five hundred dollars for the sake of peace; that the said Hovey was under present embarrassments, having only secured one award for a client before said commission, amounting to only the sum of four thousand dollars, but the said McDonald repudiated all liability and refused to make any compromise or acknowledgment of the said claim, or any part thereof, and this the said defendants have ever since and still continue to do. And the said defendants say that all representations aforesaid as to any and all negotiations accomplished, pending

or prospective, between said complainants and said Marquis and said Ford with any relative by marriage of either of said commissioners, or with said commissioners themselves, or by or through any other person with either of said commissioners, they believe to be false and fraudulent, and well known to be so at the time made by the parties so making them, and by each of the parties so connected as aforesaid in said conspiracy, and that they were so made for the purpose of deceiving and defrauding the said defendant McDonald and accomplishing the general purposes of said conspiracy; that the defendants do not know when or in what manner possession of the said paper marked "Exhibit H. and D., No. 1," of said bill of complaint, was obtained by said complainants, but deny that it was obtained with their consent, and they say that they are informed and believe that said Moyers, said Ford and the Marquis de Chambrun have repeatedly claimed that they were interested in and were parties to said pretended contract, and defendants say that they were united in a conspiracy to induce the said McDonald to execute the pretended contract described in said bill of complaint, and are equally with said complainants entitled to and claim to share in the benefit thereof, so they charge the truth to be and so advise the court that there is a defect of parties plaintiff in this suit.

Prayer.

65 1. These defendants thereupon ask, in the nature of a cross-petition, that by reason of the facts hereinbefore stated said complainants may be ordered by the court to deliver said pretended contract to the court to be cancelled.

2. That if said complainants neglect or refuse to deliver up said pretended contract to the honorable court, that the same may be declared to be void and of no effect.

3. That the writ of injunction be forthwith issued restraining said complainants from proceeding to enforce the collection of the sum provided to be paid in the said pretended contract by any other suit or proceeding.

4. That the complainants may be ordered to make the necessary parties plaintiff.

5. That the defendants may have such further and other relief in the premises as the nature of the case requires, and may be hence discharged with their reasonable costs in this behalf most unjustly expended.

AUGUSTINE R. McDONALD.
WM. WHITE,
Per A. R. McDONALD.

CHARLES A. RAY,
Solicitor for Defendants.

I do solemnly swear that I have read the answer and the cross-petition by me subscribed, and know the contents thereof, and that the facts therein stated upon the personal knowledge of said de-

fendants are true, and that the facts therein stated upon information and belief I believe to be true.

AUGUSTINE R. McDONALD.

Subscribed and sworn before me this 1st day of May, 1876.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk*.

66 EXHIBIT E. No. 7.

Amended Replication for Complainants.

Supreme Court, District of Columbia.

Filed May 6, 1876. R. J. Meigs.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE.
} No. 3937. In Equity. Docket 14.

The complainants, by leave of court first had and obtained, amend their replication and say that they join issue in full with the defendants.

DURANT & HORNOR,
For Complainants.

EXHIBIT E. No. 8.

Motion to Strike Out Cross-bill.

In the Supreme Court of the District of Columbia.

Filed May 5, 1876. R. J. Meigs.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE.
} No. 3937. In Equity.

67 The complainants, Charles E. Hovey and William P. Dole, now come by their counsel, Durant and Hornor, and move the court to strike out from the paper filed herein by defendants, and purporting to be an answer and cross-bill, all that portion thereof designated as articles one to thirteen inclusive, and the prayers thereunto attached, as found on page thirteen and the following of the manuscript answer, and purporting to be a cross-bill, on the grounds following, to wit:

First. That the order of court has been null allowing said supposed cross-bill to be filed.

Second. That no process is prayed for in said supposed cross-bill. Therefore they pray that the said purpose of the answer styled a cross-bill may be stricken out.

DURANT & HORNOR,
For Complainants.

Please to take notice that on tomorrow, Saturday, sixth May, at the opening of court, or as soon thereafter as counsel can be heard, we will call up the foregoing motion for a rule.

DURANT & HORNOR,
For Complainants.

Received this — day of May, 1876, a copy of the above.

I hereby certify that I, this 5th May, 1876, at about 1 o'clock p. m., served a copy of the foregoing motion and notice on Mr. Charles A. Ray, att'y-at-law, by leaving the same in the hands of Mr. W. A. Johnson in his (Ray's) office, No. 515 Seventh St., who promised to hand said motion and notice to Mr. Ray.

J. E. TRUDEAU.

68 EXHIBIT E. No. 9.

Order by Court Transferring to General Term Motions to Restore Money and to Suppress Depositions.

Supreme Court of the District of Columbia.

Filed Sept. 15, 1876. R. J. Meigs.

CHARLES E. HOVEY and WILLIAM P. DOLE *vs.* AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3937. In Equity.

The motion entered in the above-named cause by complainants' counsel on the — day of May, 1876, for a rule on defendants to restore to the custody of the court the sum of $19,297.56, came on this day for hearing before the court.

And immediately thereafter came on also for hearing before the court the motion made by counsel of complainants to suppress certain portions of the depositions, which motions were entered on the — day of September, 1876, to be heard. Present: Thomas J. Durant, for complainants, and Charles A. Ray, for defendants, in both motions.

When, by request of the counsel on both sides with regard to the motion to return the money, and by the court, *ex proprio motu*, in regard to the motion to suppress certain portion of depositions, it is ordered by the court that both motions be referred to the general term, to be heard there in the first instance.

A. B. OLIN.

69 EXHIBIT E. No. 10.

Decree in General Term Requiring Defendants to Pay Funds to Registry of Court.

Supreme Court of the District of Columbia.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3937.

The motion made at special term on the fifth May, 1876, by complainants for a rule upon defendants to require them to deposit in the custody of the court a sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold, which had been paid to the said defendants by the receiver, George W. Riggs, under an order of court of the twenty-eighth day of June, 1875, having been transferred by order of the special term of the fifteenth of September, 1876, to this general term, to be heard here in the first instance, came on to be heard before the court on the twenty-seventh day of February, 1877, and was argued by counsel, and thereupon, upon consideration thereof, as it appears by the order of court in special term of twelfth July, 1875, that the fund in controversy was paid over to the defendants jointly, the court doth order, adjudge and decree that the defendants, Augustine R. McDonald and William White, be now ordered and required to pay over
70 to the registry of the court the amount so by them received, namely, forty-nine thousand two hundred and ninety-seven dollars and fifty cents, without delay or defalcation.

BY THE COURT.

EXHIBIT E. No. 11.

Notice of Motion, Motion for Rule for Contempt, Copies of Affidavits, and Affidavit of Service on William A. Cook.

Supreme Court of the District of Columbia, General Term, September, 1877.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3937.

To Charles A. Ray and William A. Cook, Esqs., counsel of defendants in the above-named cause.

GENTLEMEN: You will please take notice that on Monday, the twenty-fourth day of September, 1877, and at the opening of the general term, or as soon thereafter as counsel can be heard, we will call up the subjoined motion.

September 14, 1877.

DURANT & HORNOR,
Counsel for Complainants.

71 And now, into this honorable court, by their counsel, Durant & Hornor, come the complainants in the above-entitled cause, and on showing to the court that on the nineteenth day of June, 1877, this court passed an order directing the defendants, Augustine R. McDonald and William White, to pay into the registry of the court forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold without defalcation or delay; and on further showing to the court that a copy of the said order, under seal of the court, was served upon the said defendant, William White, personally on the twenty-eighth day of June, 1877, and that a true copy under seal of the court was served upon Augustine R. McDonald by leaving the same at No. 911 H street northwest, in this city, which was the last place of abode of the said McDonald here; and having made diligent search and enquiry for the said McDonald, who could not be found, and after having been credibly informed that he had left this city, and after having made fruitless efforts to ascertain his whereabouts, and on further showing to the court that the said defendants, Augustine R. McDonald and William White, have neglected and utterly failed to comply with the aforesaid order of court, and have not deposited in the registry of the court the said sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold. Wherefore, the said complainants now move the court for an order on the said Augustine R. McDonald and the said William White to show cause on Monday, the twenty-fourth day of September, and on the opening of the general term of this honorable court, or as soon thereafter as counsel can be heard, why they and each of them should not be punished for disobedience of the order of the court, directing them to pay the said money into the registry of the court, as for a contempt.

DURANT & HORNOR,
For Complainants.

I have this day received a copy of the above notice and motion, and also copies of the affidavits of John A. Caldwell and E. V. Price, attached to copies respectively of the order of court, requiring defendants to pay into the registry of the court the sum of $49,297.50, September —, 1877.

72 EXHIBIT E. No. 12.

Decree of General Term on Rule upon Defendants for a Contempt.

In the Supreme Court of the District of Columbia, General Term.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3937. In Equity.

The motion made by complainants for a rule upon the defendants to show cause why they should not be decreed to be in and

punished as for a contempt of court for having failed to obey an order of the court of nineteenth June, 1877, directing them to pay into the registry of the court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold, came on to be heard and was argued by counsel of complainants, counsel of defendants being absent, though duly notified; and, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows: That the said rule be made absolute, and that the said Augustine R. McDonald and the said William White, the defendants, be taken and deemed to be in contempt of the aforesaid order of the court.

That unless the said Augustine R. McDonald and the said William White, within six days from the entry of this order and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of the nineteenth June, 1877, and pay into the registry of this court the sum of forty-nine thousand
73 two hundred and ninety-seven dollars and fifty cents, in gold, the answer filed by them in this cause be stricken out, and that this cause proceed as if no answer therein had been interposed. And that until the said defendants shall comply with the said order of nineteenth June, 1877, all proceedings on the part of the said defendants in this cause be, and the same are hereby, perpetually stayed.

By order of the court.

D. K. CARTTER,
Chief Justice.

EXHIBIT E. No. 13.

Motion for Rule to Show Cause, with Return of Service on Defendants' Solicitors.

Supreme Court of the District of Columbia, General Term.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. MCDONALD and WILLIAM WHITE. } No. 3937. In Equity.

Charles A. Ray and William A. Cook, Esquires, solicitors for defendants:

Take notice that on Saturday, the twenty-ninth day of December, 1877, at the opening of the court, or as soon thereafter as counsel can be heard, we will move the court for an order against the defendants to the effect that their answer be taken from the files of the court, in accordance with copy of motion, which is subjoined.

DURANT & HORNOR,
For Complainants.

74 And now into this honorable court, by their counsel, Durant & Hornor, come the complainants in the above-named cause, and on suggesting to the court that a copy, under seal, of the order of this court of Saturday, eighth of December, 1877, was served upon William A. Cook, Esq., one of the solicitors of the defendants, on the eighth day of December, 1877, and on Charles A. Ray, Esq., one of the solicitors of the defendants, on the tenth day of December, 1877, and on further suggesting that more than six days have elapsed since the said order of court and the said service were made, and on further suggesting that the said defendants, Augustine R. McDonald and William White, have not complied with the order of this court of nineteenth day of June, 1877, and have not paid into the registry of this court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold, as commanded, the said complainants thereupon move the court for an order directing the answer filed by the defendants, McDonald and White, to be stricken out and removed from the files; that this cause be now and hereafter proceeded with as if no answer herein had been interposed, and that until the said defendants, McDonald and White, shall comply with the said order of nineteenth June, 1877, all proceedings on the part of said defendants in this cause are stayed.

DURANT & HORNOR,
For Complainants.

Edward V. Price, of lawful age, being duly sworn, says that on the twenty-fourth day of December, 1877, he served a true copy of the above on William A. Cook, Esq., one of the solicitors of defendants, by leaving the same at his office, on Louisiana avenue, in this city, in the hands of a man known to affiant to be employed there; and on the same day he served a copy of the above on Charles A. Ray, Esq., another of the solicitors of defendants, personally.

EDWARD V. PRICE.

75 Sworn to and subscribed before me this 27th day of December, 1877.

R. J. MEIGS, *Clerk.*
R. J. MEIGS, JR., *Ass't Clerk.*

EXHIBIT E. No. 14.

Order on Motion to Take Answer from Files.

Supreme Court of the District of Columbia, Sitting in General Term.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3937. In Equity.

The motion for a rule on the defendants to show cause why their answer should not be stricken out came on this 29th day of December, 1877, to be heard before the court and was argued by Thomas J.

punished as for a contempt of court for having failed to obey an order of the court of nineteenth June, 1877, directing them to pay into the registry of the court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold, came on to be heard and was argued by counsel of complainants, counsel of defendants being absent, though duly notified; and, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows: That the said rule be made absolute, and that the said Augustine R. McDonald and the said William White, the defendants, be taken and deemed to be in contempt of the aforesaid order of the court.

That unless the said Augustine R. McDonald and the said William White, within six days from the entry of this order and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of the nineteenth June, 1877, and pay into the registry of this court the sum of forty-nine thousand
73 two hundred and ninety-seven dollars and fifty cents, in gold, the answer filed by them in this cause be stricken out, and that this cause proceed as if no answer therein had been interposed. And that until the said defendants shall comply with the said order of nineteenth June, 1877, all proceedings on the part of the said defendants in this cause be, and the same are hereby, perpetually stayed.

By order of the court.

D. K. CARTTER,
Chief Justice.

EXHIBIT E. No. 13.

Motion for Rule to Show Cause, with Return of Service on Defendants' Solicitors.

Supreme Court of the District of Columbia, General Term.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3937. In Equity.

Charles A. Ray and William A. Cook, Esquires, solicitors for defendants:

Take notice that on Saturday, the twenty-ninth day of December, 1877, at the opening of the court, or as soon thereafter as counsel can be heard, we will move the court for an order against the defendants to the effect that their answer be taken from the files of the court, in accordance with copy of motion, which is subjoined.

DURANT & HORNOR,
For Complainants.

74 And now into this honorable court, by their counsel, Durant & Hornor, come the complainants in the above-named cause, and on suggesting to the court that a copy, under seal, of the order of this court of Saturday, eighth of December, 1877, was served upon William A. Cook, Esq., one of the solicitors of the defendants, on the eighth day of December, 1877, and on Charles A. Ray, Esq., one of the solicitors of the defendants, on the tenth day of December, 1877, and on further suggesting that more than six days have elapsed since the said order of court and the said service were made, and on further suggesting that the said defendants, Augustine R. McDonald and William White, have not complied with the order of this court of nineteenth day of June, 1877, and have not paid into the registry of this court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold, as commanded, the said complainants thereupon move the court for an order directing the answer filed by the defendants, McDonald and White, to be stricken out and removed from the files; that this cause be now and hereafter proceeded with as if no answer herein had been interposed, and that until the said defendants, McDonald and White, shall comply with the said order of nineteenth June, 1877, all proceedings on the part of said defendants in this cause are stayed.

DURANT & HORNOR,
For Complainants.

Edward V. Price, of lawful age, being duly sworn, says that on the twenty-fourth day of December, 1877, he served a true copy of the above on William A. Cook, Esq., one of the solicitors of defendants, by leaving the same at his office, on Louisiana avenue, in this city, in the hands of a man known to affiant to be employed there; and on the same day he served a copy of the above on Charles A. Ray, Esq., another of the solicitors of defendants, personally.

EDWARD V. PRICE.

75 Sworn to and subscribed before me this 27th day of December, 1877.

R. J. MEIGS, *Clerk.*
R. J. MEIGS, JR., *Ass't Clerk.*

EXHIBIT E. No. 14.

Order on Motion to Take Answer from Files.

Supreme Court of the District of Columbia, Sitting in General Term.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3937. In Equity.

The motion for a rule on the defendants to show cause why their answer should not be stricken out came on this 29th day of December, 1877, to be heard before the court and was argued by Thomas J.

Durant for complainants, and no one appearing for defendants; whereupon, and upon consideration thereof, it appearing to the court that the order of this court of eighth December was served upon William A. Cook, one of the solicitors of defendants, on the seventeenth day of December, 1877, and on Charles A. Ray, Esq., on the seventeenth day of December, that more than six days have elapsed since the said notices were served, and that the defendants have not complied with the order of this court aforesaid of
76 the eighth day of December, 1877, and have not, as therein commanded, restored to and deposited in the registry of this court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold; it is thereupon ordered, adjudged and decreed that the answer filed in this cause by the defendants, Augustine R. McDonald and William White, be stricken out and removed from the files of the court, and that this cause do proceed as if no answer herein had been interposed; and that until the said defendants, Augustine R. McDonald and William White, shall comply with the order of this court of nineteenth day of June, 1877, and with the order of eighth December, 1877, and deposit in the registry of this court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold, all proceedings on the part of said defendants in this cause are stayed.

By order of the court.

D. K. CARTTER,
Chief Justice.

EXHIBIT E. No. 15.

Supreme Court of the District of Columbia, General Term.

HOVEY and DOLE
vs.
McDONALD and WHITE. } No. 3937.

The answer of defendant having been removed from the files for their contempt in refusing to obey the order of the court and deposit in the registry the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, it is now ordered, adjudged
77 and decreed that the bill be taken *pro confesso* against them. And this order is made independently of the question whether William A. Cook has appeared at any time as solicitor in this case.

Feb. 12, 1878.

BY THE COURT.

EXHIBIT E. No. 16.

Decree Making Absolute Former Decree.

Supreme Court of the District of Columbia, General Term.

HOVEY and DOLE
vs.
McDONALD and WHITE. } No. 3937. In Equity.

This cause came on to be heard at the April term on this seventeenth day of April, 1878, and it appearing that at the preceding January term, on the eleventh day of February, 1878, it was ordered, adjudged and decreed that complainants' bill be taken *pro confesso* against the defendants; and it further appearing that the said defendants are still in contempt of the orders of the court of the nineteenth day of June, 1877, and of eighth December, 1877, directing them to restore to the registry of the court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold, and have refused and neglected and are still refusing and neglecting to obey the said orders; and it appearing by the original and amended bills of complaint herein that in the month of June, 1873, the defendant, Augustine R. McDonald, employed
78 the complainants, Charles E. Hovey and William P. Dole, as attorneys-at-law, to prosecute a claim of him, the said McDonald, before the Mixed Commission on British and American Claims under the treaty of May eighth, 1871, for the value of five thousand bales of cotton, more or less, amounting to the sum of two million dollars, more or less, for which services the said Augustine R. McDonald agreed to pay the said Charles E. Hovey and the said William P. Dole a sum equal to twenty-five per centum, being one-fourth of the amount which might be allowed on said claim, the payment of which sum was agreed to be and made a lien upon the said claim and upon any draft, money or evidence of indebtedness which might be paid or issued on said claim; and it further appearing that the said complainants faithfully performed all things so as aforesaid by them agreed to be performed, and that there was allowed and awarded by the said Mixed Commission on British and American Claims in favor of the said Augustine R. McDonald the sum of one hundred and ninety-seven thousand one hundred and ninety dollars in gold; and it further appearing that, upon the award and allowance aforesaid, the defendant, Augustine R. McDonald, became indebted and liable to pay to the complainants the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold, being one-fourth of the sum so awarded, and that for the payment of the said amount, the complainants had a lien upon the claim and upon the certificate of amount allowed thereon, and upon all moneys due or payable in respect thereof; and it appearing that, on the twelfth day of August, 1874, the said Augustine R. McDonald, for the purpose of defrauding complainants

out of their just rights, assigned, but colorably and without consideration, and with a fraudulent design against complainants, to the other defendant, William White, the whole of said award; that the said William White, at the time of taking said assignment, was a party to said fraudulent design, and had notice of the claim and lien of the complainants; and all these facts being explicit in the bill and amended bill of complaints, and standing without denial on the part of the defendants, it is now, on the mo-
79 tion of Durant & Horner, of counsel for the complainants, ordered, adjudged and decreed that the decree *pro confesso* of the 11th February, 1878, be made absolute, and that the said defendants, Augustine R. McDonald and William White, pay to the complainants the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold. And it is further ordered, adjudged and decreed that the complainants have a lien upon the claim of Augustine R. McDonald against the United States, as awarded by the Mixed Commission of British and American Claims under the treaty of May eighth, 1871, of one hundred and ninety-seven thousand one hundred and ninety dollars in gold, and upon any draft, money, evidence of indebtedness or proceeds thereof, with legal interest from this date.

By order of the court.

D. K. CARTTER,
Chief Justice.

At a special term of the superior court of the city of New York held at chambers in said city on the 10 day of June, 1890.

Present: Honorable Richard O'Gorman, judge.

CHARLES E. HOVEY and Another
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, Executors of John Elliott, Deceased.

Upon the annexed consent, it is—

Ordered, that the above cause be, and the same is hereby referred to Daniel G. Rollins to hear and determine all the issues herein, without prejudice to the defendants to move at a special term for leave to amend their answer and for commissions to take
80 testimony, if required, and that defendants may serve affidavits and notice of motion for Wednesday, June 18, any day during the present week, on motion to amend answer.

RICHARD O'GORMAN, *J.*

Superior Court of the City of New York.

CHARLES E. HOVEY and Another
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, Executors of John Elliott, Deceased.

It is hereby consented that the above cause be referred to Daniel G. Rollins to hear and determine all the issues herein, and that an

order to that effect be entered without notice, but said order shall provide that it is made without prejudice to the defendants to move at special term for leave to amend their answer and for commissions to take testimony, if required, and that defendants may serve affidavits and notice of motion for Wednesday, June 18th, any day during the present week, on motion to amend answer.

Dated New York, June 9, 1890.

R. D. HARRIS,
Att'y for Def'ts, George Elliott and George L. Elliott, Ex'ors.

THOS. M. WHEELER,
Pl'ffs' Att'y.

(Endorsed:) Superior court, city of New York. Charles E. Hovey and another, plaintiffs, against George Elliott and another, executors, &c., defendants. Copy order of reference. Thomas M. Wheeler, attorney for pl'ffs, 7 Nassau St., New York city. Due service
81 of a copy of the within order is hereby admitted. Dated New York, June 11, 1890. R. D. Harris, attorney for d'f'd'ts Elliott.

Superior Court, City of New York.

CHARLES E. HOVEY and Another
against
GEORGE ELLIOTT and Another, as Executors, &c. } Referee's Report.

The undersigned referee, to whom it was referred by the order of this court on the 10th day of June, 1890, to hear and determine all the issues of said action, respectfully reports as follows: I have been attended by counsel for the respective parties, and having taken the oath required by statute, and heard the proofs and arguments and duly considered the same, I find as matters of fact:

First. That John Elliott, the original defendant in this action, died in the year 1888, and that George Elliott and George L. Elliott duly qualified thereafter as his executors.

Second. That on October 2, 1874, Charles E. Hovey and William P. Dole (the plaintiffs herein) filed a certain bill of complaint, in equity, in the supreme court of the District of Columbia (said court being a court of general jurisdiction in law and equity), against Augustine R. McDonald and William White.

Third. That it was in said bill alleged that the said McDonald, having a claim against the United States for cotton destroyed
82 during the rebellion, which claim was pending before the Mixed Commission on British and American Claims, agreed with the complainants that in consideration of services to be by them rendered for the said McDonald before the said commission they should be paid a sum equal to one-quarter of the amount which should be awarded on said claim by said commission, and that they should have a lien upon the said claim and upon any money, draft, or evidence of indebtedness which should be paid or issued thereon. That the said commission awarded upon the said

claim the sum of $197,190 in gold. That the said McDonald assigned all his interests in the said claim to William White. That the prayer of the said bill of complaint was that the defendants should be, by writ of injunction, restrained from assigning, disposing of, or collecting more than three-fourths of the said award; that the lien of the complainants upon the said fund and their interest in the same be established and decreed by the court, and that the said William White be decreed to execute such assignment as would entitle the complainants to receive their share of such fund.

Fourth. That in said suit an injunction was issued, restraining the said McDonald and White as prayed for in the bill of complainant.

Fifth. That the defendants appeared in said action.

Sixth. That in said action the following order was entered:

"In the Supreme Court of the District of Columbia. In Equity.

"THOMAS J. PHELPS, Assignee,
v.
"AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3910.

"This cause came on to be further heard on this 16th day of February, 1875, and thereupon and upon consideration thereof, and with the consent of the parties to this suit, and of Charles E. Hovey and William P. Dole, parties complainant in a certain
83 cause in equity in this court, numbered 3937, against the same defendants, and claiming one-fourth of the award in the proceedings mentioned:

"It is this 16th day of February, A. D. 1875, ordered and adjudged and decreed:

"1. That the restraining orders heretofore made in both said causes are hereby vacated.

"2. That the decree made in this cause on the 28th day of December, 1874, appointing George W. Riggs, Esq., receiver, and granting a provisional injunction, is modified as follows, viz: That the defendant, William White, may receive from the agent of the British government the one-half of the net amount of the award in the proceedings mentioned, free and discharged of all claims of the plaintiffs in both the causes above mentioned, to enable the said defendant to pay the expenses incurred by the defendant, A. R. McDonald, in the prosecution of this claim, which sum of one-half of said award the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant, A. R. McDonald, before said mixed commission, exclusive of the said claim of Hovey and Dole.

"3. That the remaining half of the net amount of said award shall be paid to the said George W. Riggs. And it is ordered, adjudged, and decreed that the defendants shall execute all such orders, receipts, and acquittances necessary to enable the said George W. Riggs to collect the same, and the said George W. Riggs shall hold the said half of the said award subject to the claims,

liens, and rights of the said Charles E. Hovey and Wm. P. Dole, and of the plaintiff in this cause, to be determined by the further decree of this court in this cause and in the cause of said Hovey and Dole hereinbefore mentioned.

"It is further ordered that the receiver be directed to invest the money so placed in his hands in bonds of the United States, or in 3.65 bonds of the District of Columbia, guaranteed by the United States, as he may deem best for the interest of the parties concerned, and that a copy of this decree be filed in the last-mentioned cause.

"We consent to the foregoing decree.

"J. D. McPHERSON,
"*For Thomas J. Phelps, Assignee.*
"ROBERT CHRISTY,
"*For A. R. McDonald and Wm. White, Defendants.*
"H. H. BLACKBURN,
"*Att'y for Charles E. Hovey and Wm. P. Dole.*

"Feb. 16, 1875."

84 Seventh. That the said George W. Riggs invested the amount which he received from the British government under the aforesaid order in the bonds of the District of Columbia, of which bonds $152,000 were registered bonds and $300 were coupon bonds.

Eighth. That on or about the 7th day of April, 1875, the defendants, McDonald and White, filed a demurrer to the bill of the complainants in the action in the District of Columbia above mentioned, which demurrer was sustained, with leave to the complainants to amend. On the 27th day of April, 1875, the complainants in said suit filed their amended bill, and on the 7th day of May, 1875, the defendants demurred to said amended bill. On the 24th day of June, 1875, the said supreme court of the District of Columbia made a second decree, in and by which it was ordered, adjudged, and decreed that the demurrer to said amended bill of the complaint be sustained and the bill be dismissed with costs. On the 24th day of June, 1875, the plaintiffs, Hovey and Dole, appealed to the general term of the supreme court of the District of Columbia from the decree sustaining the said demurrer. On the 28th day of June, 1875, the said supreme court of the District of Columbia in the same action of Hovey *et al.* against McDonald *et al.* made and entered another decree, in and by which it was ordered, adjudged, and decreed that the demurrer to said bill of complaint be sustained, that the bill of complaint be dismissed at the cost of the plaintiff, that the receiver appointed in said cause, and in Phelps, assignee, *v.* McDonald and White, be directed to pay the funds belonging to said cause to the defendants, McDonald and White, or order, and that thereupon said receiver should be discharged.

Ninth. That on the said 28th day of June, 1875, and after the entry of the decree of that date referred to in the last foregoing finding of fact, Augustine R. McDonald, one of the defendants in said suit, applied to George W. Riggs, receiver, for the surrender

and delivery to him of the bonds of the District of Columbia,
85 held by the said Riggs, as receiver, and in which the amount of money paid into his hands had been invested. The said George W. Riggs, receiver, made personal application to the judge holding the court in which the decree was made for instructions as to the delivery of the said bonds to said McDonald, and was informed by said judge that the delivery should be made. And thereupon the said Riggs, receiver, did deliver the said bonds and all of them to said McDonald. And upon the same day, the said McDonald sold the said bonds to the firm of Riggs & Co., of Washington, of which firm the said George W. Riggs was a member, and the defendant in this action, John Elliott, was also a member. The said bonds were sold for the market value thereof, and were purchased by Riggs & Co. from the said McDonald after they had been surrendered to the said McDonald by the said receiver, but the said firm of Riggs & Co., by reason of said receiver being a member of said firm, had knowledge at the time of the said purchase of the claim that had been made to the said bonds by the said Hovey and Dole. The said bonds of the District of Columbia were all registered bonds with the exception of $300 thereof, which were coupon bonds. Immediately after the purchase by Riggs & Co., aforesaid, the said bonds were taken to the Treasury of the United States and the title to said bonds was changed; the said bonds were surrendered to the said Treasury Department, and subsequently other and new bonds were issued to the said firm of Riggs & Co. And in the month of December, 1875, the same firm of Riggs & Co. resold the said reissued bonds in the market, and the same parted from out of their possession, and were dispersed among the purchasers thereof.

Tenth. That on or about the 2d day of July, 1875, the complainants in the suit in the District of Columbia aforesaid, to wit, Hovey and Dole, appealed to the general term of the supreme court of the District of Columbia from the decree mentioned in the preceding finding of fact as having been made and entered on the 28th day of June, 1875. On the 12th day of July, 1875, a supersedeas
86 bond was filed by the complainants on said appeal; and such proceedings were had upon the appeal thus taken as resulted in a decree of the said general term of the supreme court of the District of Columbia in said suit, on the 4th day of March, 1876, reversing the judgments or decrees of the 24th day of June, 1875, and of the 28th day of June, 1875, and ordering and decreeing that the cause be remanded to the special term, with leave to answer the complainants' bill within the time allowed under the general rules of the court. On or about the 1st day of May, 1876, the defendants, McDonald and White, answered in the said suit in the supreme court in the District of Columbia, and upon the issues thus framed testimony was taken at divers times during the years 1875 and 1876.

Eleventh. That on or about the 5th day of May, 1876, an application was made in the said supreme court of the District of Columbia by Hovey and Dole, the complainants in the said suit, for an order requiring the defendants therein to pay into court a cer-

tain sum of money, to wit, the sum of $49,297.50 in gold, the decree of the 28th of June, 1875, directing the receiver to pay the fund in his hands to McDonald, having been reversed by the decree of the said court at general term. On or about the 15th day of September, 1876, the said motion was transferred to the general term of the said supreme court of the District of Columbia. On the 15th day of June, 1877, the said Augustine R. McDonald and William White were ordered and required to pay into the registry of the said supreme court of the District of Columbia the sum of $49,297.50. The said order was not complied with, and on the 8th day of December, 1877, the defendants having been ordered to show cause why they and each of them should not be punished for disobedience of said order as for a contempt, a decree was made that the rule upon the defendants to show cause why they should not be decreed to be in and punished as for a contempt of court be made absolute, and that said McDonald and White be taken and be deemed to be in contempt of the said order. And said decree further provided that unless said defendants should pay
87 the said money into court within six days, their answer would be removed from the files of the said court and the cause proceed as if no answer had been interposed; said last-named decree not having been complied with, on the 29th day of December, 1877, the said supreme court of the District of Columbia, sitting in general term, made a decree in the said suit whereby it was ordered, adjudged, and decreed that the answer filed in said cause by the defendants, Augustine R. McDonald and William White, be stricken out and removed from the files of the court, and that the cause do proceed as if no answer therein had been interposed, and that all proceedings on the part of the defendants be stayed in the cause until said orders requiring the deposit in the registry of the court of the sum aforesaid were complied with.

On the 12th day of February, 1878, the said supreme court of the District of Columbia sitting in general term made decree as follows: That the answer of the said defendants having been removed from the files for their contempt in refusing to obey the order of court for such deposit as aforesaid of moneys in the registry of the court, the bill of complaint of Hovey and Dole against McDonald and White be taken *pro confesso* against the defendants. On the 17th day of April, 1878, the said supreme court sitting in general term made the said decree absolute, and ordered, adjudged, and decreed that the complainants have a lien upon the claim of Augustine R. McDonald against the United States, as awarded by the Mixed Commission on British and American Claims, and upon any draft, money, evidence of indebtedness, or the proceeds thereof, with legal interest from the said 17th day of April, 1878.

Twelfth. That the supreme court of the District of Columbia had in force in the year 1875, and during the month of June, 1875, certain "rules of practice."

That among said rules under "terms of court" the following was at that time in force:

"The general term: First Monday of January, third Monday of April, fourth Monday of September."

88 "The special term: First Tuesday of every month, save August, in which month there is no court."

Thirteenth. That there was in force in and during the year 1875, as rules of said supreme court of the District of Columbia, the following rule:

"91. Upon an appeal to the general term the court shall review the order, judgment, or decree appealed from, and affirm, reverse, modify the same as shall be just.

"No order, judgment, or decree of any of the courts held by a single justice of this court shall be reviewed in the general term unless the appeal be taken and perfected within thirty days after the order, judgment, or decree complained of shall have been made or pronounced.

"No such appeal shall operate as a stay of execution where the judgment is for a specific sum of money, unless the appellant, with one surety or more, to be approved by the court or one of the justices within twenty days after the judgment or decree, execute and file in the cause an undertaking in the following form substantially:

"In the Supreme Court of the District of Columbia, the — Day of ——, 18—.

"A. B., Plaintiff,
v.
"C. D., Defendant. } At Law. No. —.

"The defendant (plaintiff) having appealed to the general term from the judgment (decree) pronounced against him by the circuit court (in the special term) on the — day of ——, 18—, and —— his surety, for themselves and each of them, their and each of their heirs, executors, and administrators, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment (decree) which they agree may be pronounced against each and all of them.

"In all other cases of appeal to the general term, except in cases in which the United States is appellant, any justice of the court may determine, by order, to be entered upon the minutes of the court, the amount and character of the security to be given, which, in all cases, shall at least be sufficient to cover the costs of the appeal."

Fourteenth. That there were also in force in and during the year 1875, as rules of said supreme court of the District of Columbia, the following rules of practice in equity:

89 "Rule 6. Leading process.—The process of subpœna shall constitute the proper process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill.

"Rule 15. Default in appearing.—In default of such appearance,

the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom unless upon filing his answer, or otherwise complying with such order as the court or judge thereof may direct, as pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause."

"Rule 55. Exceptions to answer; time for filing.—After an answer is filed and notice thereof given to the plaintiff's solicitor, the plaintiff shall be allowed ten days to file in the clerk's office exceptions thereto for insufficiency, unless a longer time shall be allowed by a justice for the purpose, upon cause shown that if no exception shall be filed thereto within that period the answer shall be deemed and taken to be insufficient."

"Rule 61. Time for filing.—Whenever the answer of the defendant shall be excepted to, and shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto within ten days thereafter, and whenever the answer of the defendant shall not be excepted to, the plaintiff shall file the general replication thereto within ten days after notice of the filing of such answer; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side."

"Rule 63. Manner of setting cause for hearing and placing same on calendar.—No cause in equity shall be set down for hearing unless the same be at issue and ready for hearing or be properly set down for hearing on bill and answer, or bill, answer, and replication, and every such cause may be ordered by either party or his counsel to be placed upon the calendar, provided such order be given at least five days previous to the first day of the next special
90 term. But any cause once properly set down for hearing and placed upon the calendar, if not disposed of by the court, shall remain upon the calendar in its proper order (June 6, 1866, 1 General Term Minutes, 145)."

"Rule 64. Evidence. Answer.—If the complainant, in his bill, waive an answer under oath, or only require an answer under oath to certain specified paragraphs of his bill, the answer of the defendant, though under oath, except such parts of it as shall be directly responsive to such paragraph, shall not be evidence in his favor, unless the cause be set down on bill and answer only; but may, nevertheless, be used as an affidavit, with the same effect as heretofore, on motion in the cause; but this shall not prevent defendant from being a witness in his own behalf, under section 3 of the act of Congress of July 2, 1864, 13 Stats. 374 (Feb. 15, 1873, General Term Minutes, 142).

"Deposition of resident witnesses.—After the cause is at issue, either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all witnesses to be examined, if they live or be in the District, shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witness shall be subject to cross-examination and recross-examination, which shall be conducted, as near as may be, in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless either party request that the examination shall be by question and answer; and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel or such of them as may attend: Provided, if the witness shall refuse to sign said deposition then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just. In case of the refusal of witness to attend, to be sworn,
91 or to answer any question put by the examiner, or by counsel or solicitor, the same shall be reported to the court by the examiner, when such order shall be made as may be deemed best.

"Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the examination for such reasonable time as the examiner may fix by order in each cause.

"When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in the 30th section of the act of Congress, September 24, 1789.

"Depositions of non-resident witnesses.—Where the testimony of non-resident witnesses is desired by either party, the court in term time or any judge in vacation may, on motion designating the names of such witnesses, appoint an examiner to take such testimony, to whom the clerk shall thereupon issue a commission, under the seal of the court; and said testimony shall be taken on written interrogatories and cross-interrogatories, which written interrogatories shall be filed in the clerk's office at least ten days before the issue of such commission, so that the adverse party may have opportunity to file cross-interrogatories. But the court or judge, for special cause shown, may direct that such testimony shall be taken orally."

Amendment and Addition to Rule 64, in Equity.

Adopted by the court June 22, 1875 (2 Minutes General Term, 457).

"Where the testimony of non-resident witnesses is desired by either party, the court in term time or any judge in vacation may, on motion designating the names of such witnesses, appoint an examiner to take such testimony, to whom the clerk shall thereupon issue a commission, under the seal of the court, and said testimony shall be taken on written interrogatories and cross-interrogatories, which written interrogatories shall be filed in the clerk's office at least ten days before the issue of such commission, so that the adverse party may have opportunity to file cross-interrogatories. But the court or judge, for special cause shown, may direct that such testimony shall be taken orally."

Fifteenth. That all of such rules of the supreme court of the District of Columbia, were in force from the year 1874 to the year 1879, inclusive.

92 Sixteenth. That unless and except the foregoing rules there was no rule of practice in the supreme court of the District of Columbia relating to contempts or contempt of court between the years 1874 and 1879, both inclusive.

Seventeenth. That in the years 1874 to 1879, inclusive, there were in force certain rules of the Supreme Court of the United States, adopted and prescribed for the circuit and district courts of the United States, in equity, and among the said rules were the following:

"Rule 7. Compulsory process.—The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the said court, a writ of attachment, and if the defendant cannot be found a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

"Rule 8. Final process.—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all cost, or upon a special order of the

court or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree. (See rule 92.)

"Rule 9. Writ of assistance.—When any decree or order is for the delivery of possession of proof made by affidavit of a
93 demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court."

"Rule 18. Default.—It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken *pro confesso;* and thereupon the cause shall be prosecuted in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom unless upon filing his answer or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within the period to be fixed by the court or judge, and undertaking to speed the cause."

"Rule 66. When to be filed.—Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

"Rule 67. Commissions; when taken out.—After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice being given to the adverse party to file cross-interrogatories before the issuing of the
94 commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*.

"Who to name commissioners.—In all cases the commissioner or

commissioners shall be named by the court or by a judge upon oral interrogatories by the parties or their agents without filing any written interrogatories. Ordered (*a*), that the 67th rule be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said 67th rule.

"Notice required.—Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court or before an examiner to be specially appointed by the court; the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or their solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted, as near as may be, in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and when completed shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend: Provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner, may, upon all examinations, state any special matters to the court as he shall think fit, and any question or questions which may be objected shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

(*a*. Dec. term, 1854.)

"Compulsory attendance of witnesses.—In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

95 "Notice of time and place.—Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the examination for such reasonable time as the examiner may fix by order in each case.

"Transmission of deposition.—When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in the 30th section of act of Congress, September 24, 1789. (*a*.)

"Testimony; how taken.—Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge."

(Dec. term, 1861.)

"Court may assign the time.—Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th general rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained on motion for cause shown."

(Dec. term, 1869.)

"Rule 86. (Not contained pleadings.)—In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:' (here insert the decree or order).

"Rule 90. Practice.—In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may be reasonably applied, consistent with the local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

96 Eighteenth. That unless and except the foregoing rules and the rule 15 regarding default in appearing, there was no rule of practice in the rules of the Supreme Court of the United States, adopted and prescribed for the circuit and district courts of the United States, relating to contempts or contempt of court between the years 1874 and 1879, both inclusive.

Nineteenth. That this action was commenced by the delivery of the summons herein to the sheriff of the city and county of New York on the 16th day of April, 1884.

And I find, as conclusions of law,

I. That to enable the plaintiff to sustain this action against the defendants, the decree rendered by the supreme court of the District of Columbia in general term on the 17th of April, 1878, must be a valid decree, binding upon those defendants.

II. That from the operation of said decree the defendants enjoy exemption and immunity under section 725 of the Revised Statutes of the United States.

III. That from the effect and operation of said decree the defendants enjoy immunity and exemption under that provision of the

fifth amendment to the Constitution of the United States which prohibits the deprivation of property without due process of law.

IV. That the supreme court of the District of Columbia had no jurisdiction to render the said decree, and that the same was, and is, null and void.

V. That the plaintiffs had not, at the time of the purchase of said bonds by the firm of Riggs & Company from said McDonald, or at any time thereafter while the said firm continued to hold said bonds, any lien thereon.

VI. That said decree of April 17, 1878, is not *res adjudicata* as against the defendants in this action.

97 VII. That the defendants are entitled to judgment, dismissing the complaint with costs.

I direct judgment to be entered accordingly.

All of which is respectfully submitted.

DAN'L G. ROLLINS, *Referee.*

Plaintiffs' Requests to Find.

Superior Court of the City of New York.

CHARLES E. HOVEY and Another
against
GEORGE ELLIOTT and Another, Executors, &c.

First, that on October 2, 1874, Charles E. Hovey and William P. Dole (the plaintiffs herein) filed a bill of complaint in equity in the supreme court of the District of Columbia, against Augustine R. McDonald and William White, said court being a court of general jurisdiction in law and equity.

Yes.—D. G. R., referee.

Second. That said bill sets forth that the said McDonald, having a claim against the United States for cotton destroyed during the rebellion, which claim was pending before the Mixed Commission on British and American Claims, agreed with the complainants, in consideration of services to be rendered by the complainants for the said McDonald before the said commission, to pay to them a sum equal to one-quarter of the amount which should be awarded on said claim by said commission, and that the complainants should

98 have a lien upon the said claim and upon any money, draft, or evidence of indebtedness which should be paid or issued thereon; that the said commission awarded upon the said claim the sum of $197,190 in gold; that the said McDonald assigned all his interest in the said claim to William White; that the prayer of the said bill of complaint is that the defendants be by writ of injunction restrained from assigning, disposing of, or collecting more than three-fourths of the said award; that the lien of the complainants upon the said fund and their interest in the same be established and decreed by the court; that the said William White be decreed to execute such assignment as will entitle the complainants to receive their share thereof.

Yes.—D. G. R., referee.

Third. That in said suit an injunction was issued restraining the said McDonald and White as prayed for in the bill of complaint.

Yes.—D. G. R., referee.

Fourth. That the defendants appeared in said action.

Yes.—D. G. R., referee.

Fifth. That in said action the following order was entered.

"In the Supreme Court of the District of Columbia.

"THOMAS J. PHELPS, Assignee,
vs.
"AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3910. In Equity.

"This cause came on to be further heard on this 16th day of February, 1875, and thereupon and upon consideration thereof, and with the consent of the parties to this suit, and of Charles E. Hovey and William P. Dole, parties complainant in a certain cause in equity in this court numbered 3937, against the same defendants, and claiming one-fourth of the award in the proceedings mentioned.

"It is this 16th day of February, A. D. 1875, ordered, adjudged, and decreed:

99 "1. That the restraining orders heretofore made in both said causes are hereby vacated.

"2. That the decree made in this cause on the 28th day of December, 1874, appointing George W. Riggs, Esq., receiver and granting a provisional injunction is modified as follows, viz: That the defendant William White may receive from the agent of the British government the one-half of the net amount of the award in the proceedings mentioned, free and discharged of all claims of the plaintiffs in both the causes above mentioned, to enable the said defendant to pay the expenses incurred by the defendant A. R. McDonald in the prosecution of this claim, which sum of one-half of said award the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant A. R. McDonald before said mixed commission, exclusive of the said claim of Hovey and Dole.

"3. That the remaining half of the net amount of said award shall be paid to the said George W. Riggs, and it is ordered, adjudged, and decreed that the defendants shall execute all such orders, receipts, and acquittances necessary to enable the said George W. Riggs to collect the same, and the said George W. Riggs shall hold the said half of the said award subject to the claims, liens, and rights of the said Charles E. Hovey and William P. Dole and of the plaintiff in this cause, to be determined by the further decree of this court in this cause and in the cause of said Hovey and Dole hereinbefore mentioned.

"It is further ordered that the receiver be directed to invest the money so placed in his hands in bonds of the United States, or in 3.65 bonds of the District of Columbia, guaranteed by the United States, as he may deem best for the interest of the parties con-

cerned, and that a copy of this decree be filed in the last-mentioned cause.

" Feb. 16, 1875.

" We consent to the foregoing decree.

" J. D. McPHERSON,
"*For Thomas J. Philps, Assignee.*
" ROBERT CHRISTY,
"*For A. R. McDonald and Wm. White, Defendants.*
" H. H. BLACKBURN,
"*Att'y for Charles E. Hovey and Wm. P. Dole.*"

Yes.—D. G. R., referee.

Sixth. That the said George W. Riggs invested the amount
100 which he received from the British government under the aforesaid order in the bonds of the District of Columbia, of which bonds $152,000 were registered bonds and $300 were coupon bonds.

Yes.—D. G. R., referee.

Seventh. That in said suit of Hovey and Dole against McDonald and White the defendants demurred to the bill of complaint, and on June 24, 1875, a decree was entered sustaining the demurrer and dismissing the bill of complaint.

Yes.—D. G. R., referee.

Eighth. That on the said 24th day of June the complainants appealed from the said last-mentioned decree to the general term of said supreme court of the District of Columbia.

Yes.—D. G. R., referee.

Ninth. That on the 28th of June, 1875, an order was made in said suit which, after reciting said decree of the 24th of June, 1875, directed the receiver, George W. Riggs, to pay over the funds belonging to said suit to McDonald and White or order.

No; except as found in my report.—D. G. R., referee.

Tenth. That on the 2d of July, 1875, the complainants appealed to the said general term from the said last-mentioned order.

Yes.—D. G. R., referee.

Eleventh. That on July 12th and 13th, 1875, the complainants filed bonds on said appeals.

Yes.—D. G. R., referee.

Twelfth. That on the 28th of June, 1875, the said George W. Riggs delivered to the said McDonald the said bonds held by him as receiver.

Yes.—D. G. R., referee.

Thirteenth. That on said 28th of June, and immediately upon the receipt by him of the said bonds the said McDonald sold the same to the firm of Riggs & Company.

Yes.—D. G. R., referee.

Fourteenth. That the said firm of Riggs & Company was then composed of the said George W. Riggs, John Elliott, Charles C. Glover, Thomas Hyde, and Adolphus T. Kieckhoefer.

101 Yes.—D. G. R., referee.

Fifteenth. That the said firm of Riggs & Company were

bankers, doing business in the cities of Washington and New York, and that said George W. Riggs and Charles C. Glover were the principal members of the said firm in Washington, and said John Elliott was the New York member of said firm.

Yes.—D. G. R., referee.

Sixteenth. That the purchase of the said bonds from the said McDonald by the said Riggs & Company was made by the said George W. Riggs and the said Charles C. Glover.

Yes.—D. G. R., referee.

Seventeenth. That the said George W. Riggs, at the time of the purchase of the said bonds by Riggs & Company, knew of the said suit of Hovey and Dole against McDonald and White and that it related to the said bonds.

No; except as found in my report.—D. G. R., referee.

Eighteenth. That the said Charles C. Glover, at the time of the purchase of the said bonds by Riggs & Company, knew of the said suit of Hovey and Dole against McDonald and White and that it related to the said bonds.

No; except as found in my report.—D. G. R., referee.

Nineteenth. That on the said appeals the said general term reversed the said decree of June 24th and the said order of June 28, 1875.

Yes.—D. G. R., referee.

Twentieth. That on the 17th of April, 1878, in the said suit of Hovey and Dole against McDonald and White the complainants obtained judgment against the defendants.

Yes.—D. G. R., referee.

Twenty-first. That the said last-mentioned judgment is as follows:

102 "Supreme Court of the District of Columbia, General Term.

"HOVEY and DOLE
vs.
McDONALD and WHITE. } No. 3937. In Equity.

"This cause came on to be heard at the April term, on this seventeenth day of April, 1878, and it appearing that at the preceding January term, on the eleventh day of February, 1878, it was ordered, adjudged, and decreed that the complainants' bill be taken *pro confesso* against the defendants; and it further appearing that the said defendants are still in contempt of the orders of the court of the nineteenth day of June, 1877, and of eighth December, 1877, directing them to restore to the registry of the court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold and have refused and neglected and are still refusing and neglecting to obey the said orders; and it appearing by the original and amended bills of complaint herein that in the month of June, 1873, the defendant Augustine R. McDonald employed the complainants Charles E. Hovey and William P. Dole as attorneys-at-law, to prosecute a claim of him, the said McDonald, before the Mixed Commission on British and American Claims, under the treaty

of May 8th, 1871, for the value of five thousand bales of cotton, more or less, amounting to the sum of two million dollars, more or less, for which services the said Augustine R. McDonald agreed to pay the said Charles E. Hovey and the said William P. Dole a sum equal to twenty-five per centum, being one-fourth of the amount which might be allowed on said claim, the payment of which sum was agreed to be and made a lien upon the said claim and upon any draft, money, or evidence of indebtedness which might be paid or issued on said claim; and it further appearing that the said complainants faithfully performed all things so as aforesaid by them agreed to be performed, and that there was allowed and awarded by the said Mixed Commission on
103 British and American Claims in favor of the said Augustine R. McDonald the sum of one hundred and ninety-seven thousand one hundred and ninety dollars in gold; and it further appearing that upon the award and allowance aforesaid the said defendant, Augustine R. McDonald, became indebted and liable to pay to the complainants the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold, being one-fourth of the sum so awarded, and that for the payment of the said amount the complainants had a lien upon the claim and upon the certificate of amount allowed thereon, and upon all moneys due or payable in respect thereof; and it appearing that on the twelfth day of August, 1874, the said Augustine R. McDonald, for the purpose of defrauding complainants out of their just rights, assigned, but colorably and without consideration, and with a fraudulent design against complainants, to the other defendant, William White, the whole of said award; that the said William White, at the time of taking said assignment, was a party to said fraudulent design and had notice of the claim and lien of the complainants; and all these facts being explicit in the bill and amended bill of complainants and standing without denial on the part of the defendants,

"It is now, on motion of Durant & Hornor, of counsel for the complainants, ordered, adjudged, and decreed that the decree *pro confesso* of the 11th February, 1878, be made absolute, and that the said defendants, Augustine R. McDonald and William White, pay to the complainants the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents in gold; and it is further ordered, adjudged, and decreed that the complainants have a lien upon the claim of Augustine R. McDonald against the United States, as awarded by the Mixed Commission of British and American Claims under the treaty of May eighth, 1871, of one hundred and ninety-seven thousand one hundred and ninety dollars in gold, and upon any draft, money, evidence of indebtedness, or proceeds thereof, with legal interest from this date.

"By order of the court.

"D. K. CARTTER,
"*Chief Justice.*"

Yes.—D. G. R., referee.

Twenty-second. That the said judgment is unreversed and in full force.

Yes, that the judgment is unreversed; no, that it is in full force.—D. G. R., referee.

104 Twenty-third. That in the said suit of Hovey and Do against McDonald and White the said supreme court of th District of Columbia had jurisdiction of the parties and of th subject-matter of the action.

Yes.—D. G. R., referee.

Twenty-fourth. That after the 17th day of April, 1878, an orde was made in the said cause of Hovey *et al. v.* McDonald *et al.* tha the said receiver, George W. Riggs, file his account.

Yes.—D. G. R., referee.

Twenty-fifth. That in obedience to said last-mentioned order th said receiver filed his account.

Yes.—D. G. R., referee.

Twenty-sixth. That the plaintiffs filed exceptions to said ac count; that thereupon certain proceedings were had before an au ditor of said supreme court of the District of Columbia, who re ported against the exceptions of the plaintiffs and in favor of th said receiver; that the report of said auditor was confirmed by a order of the said court, and that the plaintiffs appealed therefro to the Supreme Court of the United States.

Yes.—D. G. R., referee.

Twenty-seventh. That the counsel for the executor of said Georg W. Riggs, receiver, moved to dismiss the said appeal to the Suprem Court of the United States upon the ground, among others, that th said decree of April 17, 1878, rendered by the said supreme cour of the District of Columbia in the case of Hovey *et al. v.* McDonal *et al.* was void, because said court had no power to strike out th answer of McDonald and White for contempt. That the said mo tion to dismiss was denied by the said Supreme Court of the Unite States.

Yes.—D. G. R., referee.

Twenty-eighth. That the said appeal to the said Supreme Cour of the United States was heard upon its merits, and was determine by said court in favor of the said receiver.

Yes.—D. G. R., referee.

Twenty-ninth. That the registered bonds of the District of Co lumbia held by the said George W. Riggs, as receiver, were in form as follows:

105 This certifies that

District of Columbia funding bond	(Vignette)	Exempt from taxation
The District $5,000	is indebted unto	of Columbia $5,000

George W. Riggs, receiver,

or assigns, in the sum of five thousand dollars, payable August 1st, 1924, with interest from the 1st day of February, 1875, inclusive, a the rate of three and sixty-five hundredths per cent. per annum payable on the 1st day of February and August in each year, at the

Treasury of the United States. This bond is authorized by an act of Congress approved June 20, 1875, by which the faith of the United States is hereby pledged that the United States will, by proper proportional appropriations, as contemplated in this act, and by causing to be levied upon the property within said District such taxes as will do so, provide the revenues necessary to pay the interest on said bonds as the same may become due and payable, and create a sinking fund for the payment of the principal thereof at maturity.

F. COYLE,
Comptroller of the District of Columbia.

{ District of Columbia Seal. }

Washington,
May 14, 1875.

Registered in the office of the United States Treasury in accordance with the acts of Congress of June 20, 1874, and February 20, 1875.
JOHN ALLISON,
Register.

MOSES KELLY,
Treasurer.
HORACE J. FROST,
Secretary.

} Of the commissioners of the sinking fund.

Entered: J. M. K. Recorded: H. J.

(Endorsed:) Act of June 20, 1874. Amended February 20, 1875. Transfer. No. —.

Funding Bond, District of Columbia.

$5,000.

For value received, I, —— ——, assign unto

RIGGS & Co.

the within-registered bond of the District of Columbia, and hereby authorize the transfer thereof on the books in the office of the Register of the United States Treasury.

GEORGE W. RIGGS, *Receiver.*

106 Dated ——.
State of ——.
County of ——
Town of ——.

Personally appeared before me, the above-named assignor, known or proved to me to be the — payee of the within bond, and signed the above transfer, acknowledging the same to be — act or deed.
Witness my hand, official designation, and seal.

H. McINTYRE,
Act'g Ch'f Loan Div.

NOTE.—The execution and acknowledgment of the above assignment when not made at the U. S. Treasury Department must be before a U. S. judge, U. S. district attorney, clerk of a U. S. court,

collector of customs, collector or assessor of internal revenue, U. S. Treasurer or assistant treasurer or the president or cashier of a national bank, or in a foreign country before a United States minister or consul, or of any officer of the U. S. Treasury. In all cases the officer must add his official designation, residence, and seal, if he has one. When the assignment is made by a corporation it must be made as the assignor; when by a guardian, trustee, executor, administrator, an officer of a corporation, or any one in a representative capacity, proof of his authority to act must be produced to the officer before whom the assignment is made, and must accompany the bond. Assignors must be identified as known and responsible persons, to the satisfaction of the officer.

Five thousand dollars.

Yes.—D. G. R., referee.

Thirtieth. That the said McDonald had no power of attorney from the said White to receive the bonds held by George W. Riggs, as receiver.

No.—D. G. R., referee.

Thirty-first. That the said White never authorized the said McDonald to receive the fund (bonds) held by George W. Riggs, as receiver.

No.—D. G. R., referee.

Thirty-second. That the said White never authorized the said McDonald to sell the said fund (bonds) held by George W. Riggs, as receiver.

No.—D. G. R., referee.

107 Thirty-third. That John Elliott died in 1888, and George Elliott and George L. Elliott duly qualified as his executors.

Yes.—D. G. R., referee.

Thirty-fourth. That at the time of the commencement of the suit of Hovey and Dole against McDonald and White, the said McDonald was a non-resident of the District of Columbia.

Yes.—D. G. R., referee.

Thirty-fifth. That at the time of the commencement of the suit of Hovey and Dole against McDonald and White, the said White was not a resident of the District of Columbia.

Yes.—D. G. R., referee.

Thirty-six. That at the times when, in the suit of Hovey and Dole against McDonald and White, the order that the defendants deposit in the registry of the court the sum of $49,297.50, the order adjudging the defendants to be in contempt, the order striking out the answer and giving judgment for the complainants *pro confesso*, and making the *pro confesso* absolute were made neither of the said defendants could be found in the said District of Columbia.

Yes.—D. G. R., referee.

Thirty-seventh. That the solicitors who had appeared for the defendants in the suit of Hovey *et al. v.* McDonald *et al.* were served with notices of motion requiring the defendants to deposit in the registry of the court the sum of $49,297.50, to show cause why the defendants should not be punished for contempt, to strike out the

answer, and for judgment *pro confesso;* and were also served with the order requiring the defendants to deposit the said sum, and with the order of December 8, 1877, requiring the said defendants within six days to make said deposit, and the order of December 29, 1877, striking out the answer of said defendant and also the decree *pro confesso* of February 12, 1878.

Yes.—D. G. R., referee.

Thirty-eighth. That on or about the 9th day of October, 1884, John Elliott presented to this court a petition for removal
108 of this cause to the circuit court of the United States for the southern district of New York, which petition among other things stated "that this suit arises in part under the Constitution or laws of the United States or treaties made under their authority."

Yes.—D. G. R., referee.

Thirty-ninth. That under said petition this cause was removed to the circuit court of the United States for the southern district of New York.

Yes.—D. G. R., referee.

Fortieth. That upon a motion made upon the record the said circuit court remanded this cause to this court.

Yes.—D. G. R., referee.

Questions of Law.

First. That the said registered bonds of the District of Columbia are not negotiable instruments.

Yes.—D. G. R., referee.

Second. That the said Riggs & Company purchased the said bonds from McDonald during the pendency of said suit of Hovey and Dole against McDonald and White.

Yes.—D. G. R., referee.

Third. That the said Riggs & Company, having purchased the said bonds with knowledge of the claim of Hovey and Dole, took the said bonds subject to said claim.

No.—D. G. R., referee.

Fourth. That the sale of the said bonds by McDonald to Riggs & Company did not divest Hovey and Dole of their lien upon said bonds.

Refused, except as appears in report.—D. G. R., referee.

Fifth. That Riggs & Company are bound by the final decree in the suit of Hovey and Dole against McDonald and White in the supreme court of the District of Columbia, so far as related to the lien of the plaintiffs on the said bonds.

No.—D. G. R., referee.

Sixth. That John Elliott was bound by the final decree in the suit of Hovey and Dole against McDonald and White
109 in the supreme court of the District of Columbia, so far as relates to the lien of the plaintiffs on the said bonds.

No.—D. G. R., referee.

Seventh. That Hovey and Dole had a lien, to the extent of one-

quarter of the amount of the award, upon the bonds of the District of Columbia held by George W. Riggs, receiver.

No.—D. G. R., referee.

Eighth. That the lien of the plaintiffs upon the bonds held by the receiver was transferred and attached to the bonds substituted for these bonds by Riggs & Company.

No.—D. G. R., referee.

Ninth. That when Riggs & Company sold the bonds which they had substituted for the bonds held by the receiver, the lien of the plaintiffs was transferred and attached to the proceeds of those bonds.

No.—D. G. R., referee.

Tenth. That the judgment rendered by the supreme court of the District of Columbia in the case of Hovey *et al. v.* McDonald *et al.* on the 17th day of April, 1878, is valid.

No.—D. G. R., referee.

Eleventh. That the supreme court of the District of Columbia had jurisdiction and power to render the judgment entered in the case of Hovey *et al. v.* McDonald *et al.* on the 17th day of April, 1878.

No.—D. G. R., referee.

Twelfth. That the validity of the judgment of April 17, 1878, in Hovey *et al. v.* McDonald *et al.* has been determined by the Supreme Court of the United States, and such determination is *res adjudicata* and binding upon this court.

No.—D. G. R., referee.

Thirteenth. That the validity of the judgment in the case of Hovey *et al. v.* McDonald *et al.* cannot be questioned in this action.

No.—D. G. R., referee.

Fourteenth. That George W. Riggs, by delivering the bonds
110 to McDonald alone and without authority from White, did not obey the order of the court, and committed a fraud upon the plaintiffs.

No.—D. G. R., referee.

Fifteenth. That Riggs & Company, by purchasing the said bonds from McDonald without any authority from White to sell the said bonds, committed a fraud upon the plaintiffs.

No.—D. G. R., referee.

Sixteenth. That the said McDonald, by receiving the said bonds from George W. Riggs without any authority from said White, committed a fraud on the plaintiffs.

No.—D. G. R., referee.

Seventeenth. That the said McDonald, by selling the said bonds to Riggs & Company without any authority from White, committed a fraud upon the plaintiffs.

No.—D. G. R., referee.

Eighteenth. For the purpose of the lien of the plaintiffs upon the bonds taken from McDonald, the defendants held the said bonds and the reissue of other bonds for the same, and the proceeds of the sale of such other bonds, in trust for the plaintiffs.

No.—D. G. R., referee.

Nineteenth. That the present cause of action arose April 17, 1878, when the plaintiffs obtained judgment in the supreme court of the District of Columbia.

Yes.—D. G. R., referee.

Twentieth. That the plaintiffs are entitled to judgment against George Elliott and George L. Elliott, executors of John Elliott, deceased, for the sum of $49,295.50, with interest from the 17th of April, 1878, and costs.

No.—D. G. R., referee.

111 *Proposed Findings of Fact on Behalf of the Defendants Elliotts.*

New York Superior Court.

CHARLES E. HOVEY
against
GEORGE ELLIOTT and Another, as Executors of the Last Will and Testament of John Elliott, Dec'd.

First. That on the second day of October, 1874, Charles E. Hovey and William P. Dole, the plaintiffs in the present action, commenced a suit in equity in the supreme court of the District of Columbia against one Augustine R. McDonald and one William White. A true copy of the record of the said suit and of all the proceedings therein had is contained in the certain exhibit hereunto annexed and marked "Defendants' Exhibit No. 1" (which is included in a separate volume).

Yes.—D. G. R., referee.

Second. That the decree rendered by the general term of the supreme court of the District of Columbia, on 17th day of April, 1878 (Ex. No. 1, fols. 1067–1075), in the said suit, is the judgment of that date mentioned and set up in the complaint in the present action.

Yes.—D. G. R., referee.

Third. That upon the appeal taken to the supreme court of the United States by Hovey and Dole from the decree passed by the supreme court of the District of Columbia in general term on the 22d day of January, 1879, and in said exhibit contained (Ex. No. 1, fols. 1743, 1744), the transcript of the record upon such appeal was certified as follows:

112 "Clerk's office, supreme court of the District of Columbia.

"FEB. —, 1879.

"I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in my office, and that said originals together, by stipulations of counsel of the respective parties, constitute the record of the proceedings of the said court in this cause, to which is added a true copy of the complainant's answer to defendants' cross-bill, defendants' answer and cross-bill to complainant's amended

bill, appeal bond to Supreme Court U. S., and said stipulation of counsel.

"Witness my hand and the seal of said court, this 16th day of October, A. D. 1879.

"[SEAL OF COURT.] R. J. MEIGS,
"*Clerk S. C., D. C.*,
"By R. J. MEIGS, JR.,
"*Ass't C. S. C., D. C.*"

Yes.—D. G. R., referee.

Fourth. That the said appeal was decided by the Supreme Court of the United States affirming said decree, said court delivering thereon the opinion published in the case of Hovey against McDonald (109 U. S. Rep., p. 150).

Yes.—D. G. R., referee.

Fifth. That on the 7th day of September, 1874, there was filed in the supreme court of the District of Columbia by one Thomas J. Phelps, claiming to be assignee in bankruptcy of said McDonald, a certain bill in equity against the said McDonald, claiming the whole of the award rendered by the said commission in favor of the said McDonald. This case was entitled "In equity No. 3910."

Upon the filing of the said bill an injunction was granted by the said court restraining the said defendants from receiving or collecting the amount of his claim against the United States, and on the 27th day of October, 1874, the said McDonald was served with process in said suit.

Yes.—D. G. R., referee.

Sixth. That on the 2d day of October, 1874, an amended bill with the leave of the said court was filed in said cause of Phelps, assignee, *vs.* McDonald, making party defendant to said bill one William White.

113 Yes.—D. G. R., referee.

Seventh. That on the day last above mentioned summons, subpœna, and notice of injunction were served upon said White in the said cause, and on the 6th day of October, 1874, an injunction in said cause was awarded by the said court against the said White.

Yes.—D. G. R., referee.

Eighth. That on the 28th day of December, 1874, in the said suit so instituted in said court by said Phelps, assignee, the defendants in said suit were restrained from collecting the amount of the said award, and one George W. Riggs appointed receiver by said court, with authority to collect and receive the amount of said awards, and to hold the same until and subject to further order of the court. Under authority of said last-mentioned decree, the said George W. Riggs, on the 15th day of February, 1875, received from the British government the sum of $93,655.21 in gold.

Yes.—D. G. R., referee.

Ninth. That in the said suit so brought by the said Phelps there was as passed on the 16th day of February, 1875, by consent as well

of the parties in said suit as of the parties in the suit of Hovey and Dole against McDonald and White, the decree following, to wit:

Decree.

Filed February 16, 1879.

In the Supreme Court of the District of Columbia.

THOMAS J. PHELPS, Assignee,
vs.
AUGUSTINE R. McDONALD and WILLIAM WHITE. } No. 3910. In Equity.

"This cause came on to be further heard on the 16th day of February, A. D. 1875, and thereupon, and upon consideration thereof and with the consent of the parties to this suit, and of Charles E. Hovey and William P. Dole, parties complainant in a certain cause in equity in this court, numbered 3937, against the same defendants and claiming one-fourth of the award in the proceeding mentioned, it is, this 16th day of February, A. D. 1875, ordered, adjudged, and decreed:

114

"1. That the restraining orders heretofore made in both said causes are hereby vacated.

"2. That the decree made in this cause on the 28th day of December, 1874, appointing George W. Riggs, Esq., receiver, and granting a provisional injunction, is modified as follows, viz: That the defendant, William White, may receive from the agent of the British government the one-half of the net amount of the award in the proceedings mentioned, free and discharged of all claims of the plaintiffs in both the causes above mentioned, to enable the said defendant to pay the expenses incurred by the defendant, A. R. McDonald, in the prosecution of this claim, which sum of one-half of said award the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant, A. R. McDonald, before said mixed commission, exclusive of the said claim of Hovey and Dole.

"3. That the remaining half of the net amount of said award shall be paid to the said George W. Riggs, and it is ordered, adjudged, and decreed that the defendants shall execute all such orders, receipts, and acquittances necessary to enable the said George W. Riggs to collect the same, and the said George W. Riggs shall hold the said half of the said award subject to the claims, liens, and rights of the said Charles E. Hovey and William P. Dole, and of the plaintiff in this cause, to be determined by the further decree of this court in this cause, and in the cause of said Hovey and Dole hereinbefore mentioned.

"It is further ordered that receiver be directed to invest the money so placed in his hands in bonds of the United States, or in 3.65 bonds of the District of Columbia, guaranteed by the United States, as he may deem best for the interest of the parties con-

cerned, and that a copy of this decree be filed in the last-mentioned cause.

"February 16, 1875.

"We consent to the foregoing decree.

"J. B. McPHERSON,
"*For Thomas J. Phelps, Assignee.*
"ROBERT CRISTY,
"*For A. R. McDonald and William White, Defendants.*
115 "H. H. BLACKBURN,
"*Att'y for Chas. E. Hovey and Wm. Dole.*"

Yes.—D. G. R., referee.

Tenth. That under the said decree of the 16th of February, 1875, the said George W. Riggs converted said sum of $93,655.21 into currency, wherewith he purchased 3.65 bonds of the District of Columbia to the amount of $152,300.

Yes.—D. G. R., referee.

Eleventh. That in the said suit so brought by the said Phelps a demurrer was filed by the defendants thereto, and on the 28th day of June, 1875, there was passed in the said suit so brought by the said Phelps a decree similar in terms to that which on the same day was passed by the said court in the said suit brought by Hovey and Dole against McDonald and White.

This decree is printed in the answer, page 39, fol. —.

Yes.—D. G. R., referee.

Twelfth. That the said receiver, prior to his appointment as such, had been and continued, until long after the 28th of June, 1875, to remain a member of a certain firm doing business as bankers, as well at the city of Washington, in the District of Columbia, as in the city and State of New York, under the name and style of Riggs & Co. His copartners were Messrs. Elliott, Glover, Hyde, and Kieckhoefer. Of these, the first resided in and conducted the said firm business in the city of New York, and was the original and only defendant served with process in this action. The others resided and with the said Riggs conducted the business of said firm in the District of Columbia.

Yes.—D. G. R., referee.

Thirteenth. That on the 28th day of June, 1875, after the passage of the said decrees of that date, the counsel of the defendants in the said suit of Hovey and Dole *v.* McDonald and White, numbered in equity No. 3937, who was also the counsel of the defendants in the suit of Thomas J. Phelps, assignee, against McDonald and White, numbered in equity No. 3910, called upon the said Riggs,
116 receiver, at the banking-house of the said Riggs & Co., in the said city of Washington, in company with the said McDonald, presented to the said receiver a duly certified copy of the said decrees passed on the 28th day of June, 1875, and of said receiver demanded the delivery up of the fund then in his hands as by the said decrees directed.

Yes.—D. G. R., referee.

Fourteenth. That the funds then in the hands of the said receiver

consisted of 3.65 bonds of the District of Columbia, whereof there were one hundred and fifty-two thousand dollars ($152,000) in registered bonds, and three hundred dollars ($300) in coupon bonds. Such registered bonds were payable to "George W. Riggs, receiver or assigns."

Yes.—D. G. R., referee.

Fifteenth. That the said receiver was not satisfied of his duty to deliver up the said bonds upon the said demand, and while the said counsel of the said McDonald and White was then and there urging upon the said receiver his duty to make such delivery, there appeared before them the counsel for the complainant in the said suit of Thomas J. Phelps, assignee, *v.* McDonald & White, in equity No. 3910, and the said counsel of the said complainant, Phelps, then and there asserted that as he had appealed, or would appeal, from the decree passed on that day in the said suit, the operation of the said decree was suspended.

Yes.—D. G. R., referee.

Sixteenth. That no counsel or attorney of the complainants in the suit of Hovey and Dole *v.* McDonald and White, numbered in equity No. 3937, appeared before the said receiver on the 28th day of June, 1875, or on that day either gave to the said receiver any verbal notice of an appeal taken or insisted to said receiver that any appeal was a supersedeas of any decree, or as far as appears from the evidence communicated in any manner with the said receiver or the said firm or any member thereof.

Yes.—D. G. R., referee.

Seventeenth. That upon such the assertion of the said
117 counsel for the complainant in the said suit of Thomas J. Phelps, assignee, *v.* McDonald and White, numbered in equity No. 3910, and in order to be assured of his duty in the premises, the said receiver, in company with the said counsel of such complainant, Phelps, assignee, the said counsel of the said McDonald and White and the said McDonald himself, repaired to the said court, and then and there in open court, as its receiver, of the justice thereof by whom were passed the said decrees of the 28th day of June, 1875, inquired what he, the said receiver, should do in the premises, and was then and there in open court and from the bench by such justice instructed to obey the said decrees. No counsel or attorney of the complainants in the suit of Hovey and Dole *v.* McDonald and White, numbered in equity No. 3937, either accompanied the said receiver on such his mission to or appearance before the court, or on the day last above written offered to furnish any security named by the court or any appeal taken or to be taken in said suit.

From such conference with the said justice, the said receiver, the said counsel for the defendants in the said suit of Hover and Dole *v.* McDonald and White, numbered in equity No. 3937, and the said McDonald himself, returned to the said banking-house of Riggs & Co.

Yes.—D. G. R., referee.

Eighteenth. That thereafter, during the business hours of the 28th

day of June, 1875, the said receiver endorsed all of the said registered bonds in blank and acknowledged such his transfer or endorsement, property witnessed, before one H. McIntire, now deceased, but then the acting chief of the loan division of the Treasury Department of the United States, and delivered all of the said registered bonds, so acknowledged, witnessed, and endorsed, and also the said three hundred dollars in said coupon bonds, unto and into the actual and manual possession of the said McDonald, for himself and as the attorney of the said White.

Yes.—D. G. R., referee.

Nineteenth. That said receiver took therefor a receipt in the words and figures following:

118 "WASHINGTON, D. C., *June 28th*, 1875.

"Received of George W. Riggs, as receiver, one hundred and eight thousand one hundred and thirty-two $\frac{68}{100}$ — in full of the fund held as receiver.

"(Signed) W. WHITE,
"Per A. R. McDONALD.
"A. R. McDONALD.
"CHAS. A. RAY,
"*Solicitor for Wm. White and A. R. McDonald.*

"$152,300 bonds sold at 7 %	$108,138	00
"Paid George W. Riggs, receiver		32
"Paid A. R. McDonald as above	108,132	38
	$108,133	00"

Yes.—D. G. R., Referee.

Twentieth. That thereupon and on said 28th day of June, 1875, the said McDonald sold and delivered the said registered bonds so endorsed in blank, witnessed and acknowledged together with said coupon bonds unto the said firm of Riggs & Co., and at their fair market price.

Yes.—D. G. R., referee.

Twenty-first. That the sale aforesaid was made at the suggestion of and with the concurrence of the solicitor of said McDonald and William White in said cause numbered in equity No. 3937, and at the request of said McDonald.

Yes.—D. G. R., referee.

Twenty-second. That on the 28th day of June, 1875, and after their said purchase of the said registered bonds, the said firm of Riggs & Co., through the said Glover, one of the members thereof, caused the name of the said firm to be written in the blanks so left in the endorsements made of the said bonds by the said receiver, and the said bonds, with such endorsement thereof so filled up, to be sent to the Treasury Department for transfer in the name of the said firm.

Yes.—D. G. R., referee.

Twenty-third. That a copy of one of the said bonds, identical, except as to number and denomination, with all of the others so

endorsed, witnessed, and acknowledged by the said receiver,
119 and afterwards, as to the blank left in his endorsement, filled in, as aforesaid, with the name of the said firm, is as follows:

Printed at page 105, fol. —.

Yes.—D. G. R., referee.

Twenty-fourth. That the note which appears on the back of said bonds forms a part of the regulations prescribed by the Secretary of the Treasury of the United States for the assignment of said bonds.

Yes.—D. G. R., referee.

Twenty-fifth. That the customary method of transferring registered 3.65 bonds of the District of Columbia is by endorsement in blank, in conformity with the directions contained in the note appearing on their backs. When so endorsed they pass, in fact, like Government registered bonds, similarly endorsed from hand to hand, and are treated as "bearer" bonds in the commercial world.

No.—D. G. R., referee.

Twenty-sixth. That said bonds so endorsed, witnessed, and acknowledged by the said receiver, as aforesaid, were negotiable securities.

No.—D. G. R., referee.

Twenty-seventh. That in the month of January, 1875, certain regulations were established as the official regulations of the Treasury Department of the United States in relation to the United States securities.

Yes.—D. G. R., referee.

Twenty-eighth. That under the head of Bonds and Assignments said regulations of said Treasury Department provide as follows:

"*Assignments.*

"The directions on the back of the bond should be carefully observed and all blanks filled. The name of the assignee should be plainly written in the space left for that purpose. * * * Certificates should not be assigned in blank, as this makes them payable to bearer, and renders them available to any holder."

"*Successorship Assignments.*

"In case of death or successorship the representative or successor must furnish official evidence of decease and appointment.
120 An executor or administrator may assign stock standing in the name of a deceased person. Where there is more than one legal representative all must unite in the assignment, unless by a decree of court or provision of will some one is designated to dispose of the stock. If the stock was held by the deceased as a fiduciary the letters of administration must be accompanied by an order of the court authorizing the transfer."

Yes.—D. G. R., referee.

Twenty-ninth. That such regulations are printed by the Depart-

ment of the Treasury of the United States for the information of the public.

Yes.—D. G. R., referee.

Thirtieth. That such regulations were in force in the said department June 28th, 1875, and until after January 1st, 1876.

Yes.—D. G. R., referee.

Thirty-first. That the firm of Riggs & Co. purchased the said bonds from said McDonald in good faith, in point of fact, and in the actual belief that they had good right to make such purchase.

Yes.—D. G. R., referee.

Thirty-second. That there was no proof of bad faith on the part of any member of said firm of Riggs & Co. in the purchase of said bonds from said McDonald.

Yes.—D. G. R., referee.

Thirty-third. That Riggs & Co. purchased said bonds at the price of 71% on the 28th day of June, 1875.

Yes.—D. G. R., referee.

Thirty-fourth. That said price of 71% was the fair market price of said bonds in the city of Washington on the 28th day of June, 1875.

Yes.—D. G. R., referee.

Thirty-fifth. That said firm of Riggs & Co. sold $100,000 of said bonds on June 29th, 1875, in the city of New York, at 71¾, paying one-eighth of one per cent. commissions on such sale.

Yes.—D. G. R., referee.

Thirty-sixth. That the remainder of said bonds were sold by Riggs & Co. between the 29th day of June and the 10th
121 day of December, 1875, at prices ranging from 65 to 72 inclusive.

Yes.—D. G. R., referee.

Thirty-seventh. That by the 10th day of December, 1875, the firm of Riggs & Co. had sold, transferred, and delivered to purchasers all of the 3.65 bonds of the District of Columbia, including such as they had received from the said Treasury Department in lieu of those purchased by the said firm of the said McDonald, of which they had at any time theretofore been or claimed to be owners. And after the 10th day of December, 1875, the said firm held or owned or claimed no 3.65 bonds of the District of Columbia, either registered or coupon, until the 4th day of January, 1876.

Yes.—D. G. R., referee.

Thirty-eighth. That the plaintiff Hovey, before and during the year 1875, lived in the said city of Washington, where he has since continued to reside. He kept, as depositor, an account with the said firm of Riggs & Co. in that city from November, 1868, until some time in the month of August, 1875. He was in the habit of going to the banking-house of the said firm in said city, and, before the 28th of June, 1875, was personally acquainted both with the said Riggs and the said Glover.

Yes.—D. G. R., referee.

Thirty-ninth. That the said Dole before and during the year 1875 resided partly in the city of Washington and partly at Berkeley

Springs, in the State of West Virginia, and has since continued so to reside.

Yes.—D. G. R., referee.

Fortieth. That from the year 1874 up to the year 1881, the said Dole kept, as depositor, an account with the said firm of Riggs & Co. at the said banking-house in the said city.

Yes.—D. G. R., referee.

Forty-first. That when registered 3.65 bonds of the District of Columbia or registered bonds of the United States are surrendered to the Register of the Treasury of the United States and new bonds issued in their stead, the surrendered bonds are preserved in
122 the loan division of the Treasury Department of the United States at the said city of Washington as vouchers.

Yes.—D. G. R., referee.

Forty-second. That the bonds so surrendered and preserved have always been open to the examination and inspection of all persons interested therein.

Yes.—D. G. R., referee.

Forty-third. That the Treasury building of the United States at the said city of Washington is and was, on the 28th of June, 1875, situate opposite and on the other side of the avenue upon which stands and then stood the banking-house of the said firm of Riggs & Co.

Yes.—D. G. R., referee.

Forty-fourth. That new registered 3.65 bonds of the District of Columbia to the amount of $152,000 were issued by the said Register of the Treasury on the 28th day of June, 1875, to the said firm of Riggs & Co., in lieu of the said registered bonds by the said firm purchased from the said McDonald and by them sent to the said Treasury Department for transfer as aforesaid.

Yes.—D. G. R., referee.

Forty-fifth. That from the 1st day of July, 1875, to and until the institution of the present action, the plaintiff herein had adequate means of fully ascertaining how the said registered bonds, so as aforesaid by the said receiver delivered to said McDonald, had been last held and ultimately disposed of.

Yes.—D. G. R., referee.

Forty-sixth. That there was no evidence produced before the referee identifying in any form since said tenth day of December, 1875, in the hands of said firm of Riggs & Co., any of the proceeds of the said bonds purchased by said firm from said McDonald.

Yes.—D. G. R., referee.

Forty-seventh. That there was no evidence produced before the referee tending to show that the firm of Riggs & Co., or any member or survivor thereof, held the proceeds of said bonds purchased by said firm from McDonald at any time subsequent to the year 1875.

Yes.—D. G. R., referee.

123 Forty-eighth. That the said bonds were sold by Riggs & Co. for money received by them therefor.

That there is no proof that the proceeds of said bonds are now in

the possession of the surviving partners of the firm, or since said sale have been in the possession of said Riggs & Co. or its survivors, in any form or fund that can be traced or identified.

Yes.—D. G. R., referee.

Forty-ninth. That this action was commenced by the delivery of the summons to the sheriff of the county of New York with instructions to serve the same on the 16th day of April, 1884.

Yes.—D. G. R., referee.

Fiftieth. That this action was brought against John Elliott, Charles C. Glover, Thomas Hyde, and Adolphus F. Kieckhoefer as surviving partners of Riggs & Co. That John Elliott only was served with summons. That none of the other defendants were served with summons or appeared in this action.

Yes.—D. G. R., referee.

Fifty-first. That no evidence was produced before me tending to show knowledge in fact on the part of the said receiver, or by the said firm of Riggs & Co., or of any member thereof at the time of the purchase by the said firm of the said bonds from the said McDonald, of any appeal taken from the decree passed on the 24th day of June, 1875, in said suit of Hovey and Dole against McDonald and White in the supreme court for the District of Columbia.

Yes.—D. G. R., referee.

Fifty-second. That John Elliot, one of the defendants in this action, died in or about the month of ——, 1888, leaving a last will and testament, which was duly admitted to probate by the surrogate of the county of New York.

Yes.—D. G. R., referee.

Fifty-third. That the defendants, George Elliot and George L. Elliot, duly qualified as executors of said last will and testament of said John Elliot, deceased, and that this action was duly revived against the said executors.

124 Yes.—D. G. R., referee.

Fifty-fourth. That the supreme court of the District of Columbia had in force in the year 1875, and during the month of June, 1875, certain "rules of practice."

That among said rules under "terms of court," the following was at that time in force:

"The general term: First Monday of January; third Monday of April; fourth Monday of September.

"The special term: First Tuesday of every month, save August, in which month there is no court."

Fifty-fifth. That there was in force in and during the year 1875, as rules of said supreme court of the District of Columbia, the following rule. (Printed Referee's Report, page —, fol. —.)

Yes.—D. G. R., referee.

Fifty-sixth. That there was also in force in and during the *during the* year 1875, as rules of said supreme court of the District of Columbia, the following rules of practice in equity: Rules 6, 15, 55, 61, 63, 64, as amended June 22, 1875 (printed in Referee's Report, page —, fol. —), 83, 84, 85. 86, and 89:

"No. 83. Form and substance of.—In drawing up decrees and

orders neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows:

"This cause came on to be heard (or to be further heard as the case may be, at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz: 'Here insert the decree or order.')

"No. 84. Execution of decree for payment of money.—Final process to execute any decree made, if the decree be solely for the payment of money, be by a writ of *fieri facias*, or by sequestration attachment against real estate, goods, chattels, or credits of the defendant. May 17, 1873, 2 M. G. T. 127.

"No. 85. Execution of decree for specific act.—If the decree be for the performance of any specific act; for example, for the
125 execution of a conveyance of land, or the delivery of possession, or of the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice, and upon affidavit of the plaintiff or his solicitor, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus* to compel obedience to the decree.

"No. 86. For delivery of possession.—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

"No. 89. Practice in English chancery.—In all cases where these rules do not apply, the practice of the court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the District, not as positive rules but as furnishing just analogies to regulate the practice."

Yes.—D. G. R., referee.

Fifty-seventh. That all of such rules of the supreme court of the District of Columbia were in force from the year 1874 to the year 1879, inclusive.

Yes.—D. G. R., referee.

Fifty-eighth. That unless and except the foregoing rules there was no rule of practice in the supreme court of the District of Columbia relating to contempts or contempt of court between the years 1874 and 1879, both inclusive.

Yes.—D. G. R., referee.

Fifty-ninth. That in the years 1874 to 1879, inclusive, there were in force certain rules of the Supreme Court of the United States adopted and prescribed for the circuit and district courts of the United States in equity, and among said rules were the following rules: 7, 8, 9, 18, 66, 67, 86, and 90. (Printed in referee's report, page —, fol. —.)

126

Yes.—D. G. R., referee.

Sixtieth. That the said George W. Riggs departed this life on the 24th day of August, 1881, and thereafter and pending the institution of this suit the assets of the firm of Riggs & Co. were duly administered and divided amongst the surviving partners and the personal representatives of Mr. Riggs.

Yes.—D. G. R., referee.

Sixty-first. That unless and except the foregoing rules and the rule 15 regarding default in appearing, there was no rule of practice in the rules of the Supreme Court of the United States adopted and prescribed for the circuit and district courts of the United States relating to contempts or contempt of court between the years 1874 and 1879, both inclusive.

Yes.—D. G. R., referee.

Sixty-second. That the 3.65 bonds mentioned in the account of the receiver, and in the testimony of Jemmison and Glover, are the 3.65 bonds mentioned in the complaint in this action.

Yes.—D. G. R., referee.

Sixty-third. That this action was not commenced within six years after the cause of action (if any) accrued to the plaintiffs.

No.—D. G. R., referee.

127

Proposed Conclusions of Law.

New York Superior Court.

CHARLES E. HOVEY
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors.

The defendants request the referee to find as conclusions of law in this case the following, to wit:

First. That to enable the plaintiff to sustain this action against the defendant- the decree rendered by the supreme court of the District of Columbia in general term on the 17th of April, 1878, must be a valid decree binding upon these defendants.

Yes.—D. G. R., referee.

Second. That from the operation and effect of said decree the defendants enjoy exemption and immunity under section 725 of the Revised Statutes of the United States.

Yes.—D. G. R., referee.

Third. That from the effect and operation of said decree the defendants enjoy immunity and exemption, and under that provision of the fifth amendment to the Constitution of the United States

which prohibits the deprivation of property without due process of law.

Yes.—D. G. R., referee.

Fourth. That the supreme court of the District of Columbia had no jurisdiction to render the said decree, and that the same was and is null and void.

Yes.—D. G. R., refere.

Fifth. That the decree of the supreme court of the District of Columbia in said suit of Hovey and Dole *vs.* McDonald and White entered on the 24th day of June, 1875, was superseded and vacated by the decree passed in said suit on the 28th day of June, 1875.

No.—D. G. R., referee.

128 Sixth. That at the time of the purchase of said bonds by the firm of Riggs & Co., on the 28th day of June, 1875, there was no pendency in law of said suit as between Hovey and Dole as complainants and said McDonald and White as defendants therein.

No.—D. G. R., referee.

Seventh. That at the time of said purchase the suit theretofore pending between said parties had resulted in law in a single final decree from which no appeal had been taken.

No.—D. G. R., referee.

Eighth. That the said purchase of bonds by said firm of Riggs & Company, was not in law a purchase, *pendente lite*, in respect to the plaintiffs.

No.—D. G. R., referee.

Ninth. That the plaintiffs had not, at the time of the purchase of the said bonds by the firm of Riggs & Company from said McDonald, nor at any time thereafter while the said firm continued to hold said bonds, any lien thereon.

Yes.—D. G. R., referee.

Tenth. That neither the original defendant, Elliott, nor the said firm, nor any member thereof at or before the time of the purchase of said bonds by said firm, was chargeable with constructive notice of any appeal taken from the decree of June 24, 1875.

Yes.—D. G. R., referee.

Eleventh. That said registered bonds when they were purchased by said firm from said McDonald were negotiable securities issued under the authority of the United States.

No.—D. G. R., referee.

Twelfth. That said bonds when so purchased were so far analogous in their character to negotiable securities that the rules of law applicable to the purchase of property, *pendente lite*, from a party to the suit without actual notice were not applicable to them.

No.—D. G. R., referee.

Thirteenth. That said decree of April 17th, 1878, is not *res adjudicata* as against the defendants in this action.

Yes.—D. G. R., referee.

129 Fourteenth. That purchasers, *pendente lite*, from a defendant in a cause take property in controversy in the suit, sub-

ject merely to the right of the plaintiff therein to have the remedies given by the decree enforced against the property.

No. Speculative.—D. G. R., referee.

Fifteenth. That so far as said alleged decree of April 17, 1878, relates to said bonds, said bonds are not affected thereby, because it gave no remedy against said bonds.

No. The alleged decree I find to be an invalid decree.—D. G. R., referee.

Sixteenth. That the decree of April 17th, 1875 (if a valid decree at all), is not competent evidence or proof of the existence of the plaintiff's alleged lien as against the defendants in this action.

Yes.—D. G. R., referee.

Seventeenth. That suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, could not defeat the title of Riggs & Co. as purchasers of the said bonds for full value.

Yes.—D. G. R., referee.

Eighteenth. That bad faith only on the part of the said firm in purchasing said bonds could have the effect of defeating their title.

Yes.—D. G. R., referee.

Nineteenth. That the plaintiff's cause of action, if any they have or had, is barred by the statute of limitations of the State of New York, because this action was not commenced within six years after the said cause of action accrued.

No.—D. G. R., referee.

Twentieth. That the plaintiff's cause of action, if any they have or had, is limited by the statute of limitations of the State of New York to six years after it accrued.

Yes.—D. G. R., referee.

Twenty-first. That if the plaintiffs have or had any cause
130 of action they also have or had a concurrent remedy at law which accrued more than six years before the commencement of this action.

No.—D. G. R., referee.

Twenty-second. That the form in which such registered bonds were issued and the laws of the United States under which they were issued conferred a good title to such bonds upon Riggs & Co. as purchasers thereof under national authority.

Yes.—D. G. R., referee.

Twenty-third. That the defendants are entitled to judgment dismissing the complaint with costs.

Yes.—D. G. R., referee.

New York Superior Court.

CHARLES E. HOVEY and Another
against
GEORGE ELLIOTT and Another, Executors, and Others.

The plaintiff, Charles E. Hovey, excepts to the following portions of the ninth finding of fact in the referee's report: "That the said

George W. Riggs, receiver, made personal application to the judge holding the court in which the decree was made for instructions as to the delivery of the said bonds to McDonald, and was informed by said judge that the delivery should be made."

The plaintiff, Charles E. Hovey, excepts to the 1st, 2d, 3d, 4th, 5th, 6th, and 7th conclusions of law contained in the referee's report, and to each and every one thereof.

The plaintiff, Charles E. Hovey, also excepts to the refusal of the referee to find the following questions of fact, and each of them, which he was duly requested to find:

"That the said George W. Riggs, at the time of the purchase of said bonds by Riggs & Company, knew of the said suit of Hovey and Dole against McDonald and White, and that it related to said bonds."

131 Which the referee refused to find, except as found in his report.

"That the said Charles C. Glover, at the time of the purchase of the said bonds by Riggs & Company, knew of the said suit of Hovey and Dole against McDonald and White, and that it related to the said bonds."

Which the referee refused to find, except as found in his report.

That the judgment of the supreme court of the District of Columbia in the action of Hovey and Dole against McDonald and White is in full force.

That the said McDonald had no power of attorney from the said White to receive the bonds held by George W. Riggs, receiver.

That the said White never authorized the said McDonald to receive the fund (bonds) held by George W. Riggs, receiver.

That the said White never authorized the said McDonald to sell the said fund (bonds) held by George W. Riggs, receiver.

That the plaintiff, Charles E. Hovey, also excepts to the referee's refusal to find the following conclusions of law, and each of them, which he was duly requested to find.

That the said Riggs & Company having purchased the said bonds with knowledge of the claim of Hovey and Dole took the said bonds subject to said claim.

That the sale of the said bonds by McDonald to Riggs & Company did not divest Hovey and Dole of their lien upon said bonds.

Which was refused, except as appears in his report.

That Riggs & Company are and John Elliott was bound by the final decree in the suit of Hovey and Dole against McDonald and White in the supreme court of the District of Columbia so far as relates to the lien of the plaintiffs on the said bonds.

That Hovey and Dole had a lien to the extent of one-quarter of the amount of the award upon the bonds of the District of Columbia held by George W. Riggs, receiver.

That the lien of the plaintiffs upon the bonds held by
132 the receiver was transferred and attached to the bonds substituted for these bonds by Riggs & Company.

That when Riggs & Company sold the bonds which they had

substituted for the bonds held by the receiver, the lien of the plaintiffs was transferred and attached to the proceeds of these bonds.

That the judgment rendered by the supreme court of the District of Columbia in the case of Hovey *et al. v.* McDonald *et al.* on the 17th day of April is valid.

That the supreme court of the District of Columbia had jurisdiction and power to render the judgment entered in the case of Hovey *et al. v.* McDonald *et al.* on the 17th day of April, 1878.

That the validity of the judgment of April 17th, 1878, in Hovey *et al. v.* McDonald *et al.* has been determined by the Supreme Court of the United States, and such determination is *res adjudicata* and binding upon this court.

That the validity of the judgment in the case of Hovey *et al. v.* McDonald *et al.* cannot be questioned in this action.

That George W. Riggs, by delivering the bonds to McDonald alone and without authority from White, did not obey the order of the court and committed a fraud upon the plaintiff-.

That Riggs & Company, by purchasing the said bonds from McDonald without any authority from White to sell the bonds, committed a fraud on the plaintiffs.

That the said McDonald, by receiving the said bonds from George W. Riggs without any authority from White, committed a fraud on the plaintiffs.

That the said McDonald, by selling the said bonds to Riggs & Company without any authority from White, committed a fraud upon the plaintiffs.

That for the purpose of the lien of the plaintiffs upon the bonds taken from McDonald, the defendants held the said bonds and the reissue of other bonds for the same and the proceeds of the sale of such other bonds in trust for the plaintiffs.

That the plaintiffs are entitled to judgment against George
133 Elliott and George L. Elliott, executors of John Elliott, deceased, for the sum of $49,297.50, with interest from the 18th day of April, 1878, and costs.

New York Superior Court.

CHARLES E. HOVEY and Another
against
GEORGE ELLIOTT and Another, Executors, and Others.

The plaintiff, Charles E. Hovey, excepts to the following conclusions of law found by the referee at the request of the defendants, and to each of such conclusions:

That from the operation and effect of the decree rendered by the supreme court of the District of Columbia on the 17th day of April, 1878, the defendants enjoy immunity and exemption, under section 725 of the Revised Statutes of the United States.

That from the effect and operation of said decree the defendants enjoy immunity and exemption *and* under the provisions of the fifth amendment to the Constitution of the United States which prohibits the deprivation of property without due process of law.

The supreme court of the District of Columbia had no jurisdiction to render the said decree, and that the same was and is null and void.

That the plaintiff had not at the time of the purchase of the said bonds by the firm of Riggs & Company from said McDonald, nor at any time thereafter while the said firm continued to hold said bonds, any lien thereon.

That neither the original defendant, Elliott, nor the said firm, nor any member thereof at or before the time of the purchase of said bonds by said firm, was chargeable with constructive notice of any appeal taken from the decree of June 24, 1875.

That said decree of April 17, 1878, is not *res adjudicata* as against the defendants in this action.

134 That the said decree of April 17, 1878 (if a valid decree at all), is not competent evidence or proof of the existence of the plaintiff's alleged lien as against the defendants in this action.

That suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, could not defeat the title of Riggs & Co. as purchasers of the said bonds for full value.

That bad faith only on the part of the said firm in purchasing said bonds could have the effect of defeating their title.

That the plaintiff's cause of action, if any they have or had, is limited by the statute of limitation to six years after it accrued.

That the form in which such registered bonds were issued, and the laws of the United States under which they were issued, conferred a good title to such bonds upon Riggs & Co. as purchasers thereof under national authority.

That the defendants are entitled to judgment dismissing the complaint with costs.

The plaintiff, Charles E. Hovey, also excepts to the following findings of fact made by the referee at the request of the defendants.

That the firm of Riggs & Co. purchased the said bonds from said McDonald in good faith in point of fact, and in the actual belief that they had good right to make such purchase.

That there was no proof of bad faith on the part of any member of said firm of Riggs & Co. in the purchase of said bonds from said McDonald.

THOMAS M. WHEELER,
Att'y for Pl'ffs.

135 Superior Court of the City of New York.

CHARLES E. HOVEY and Another
against
JOHN ELLIOTT and Others.
} Referee's Opinion.

In June, 1873, there was pending before the Mixed Commission on British and American Claims, then sitting at the city of Wash-

ington, in the District of Columbia, a certain claim in behalf of one Augustine R. McDonald. McDonald entered into a written agreement with the plaintiffs in this action, whereby, in consideration of services thereafter to be rendered by them in the prosecution of such claim, it was provided that they should receive a sum equal to twenty-five per centum of the amount that should be recovered—"the payment of which sum," the agreement proceeds to say, "is hereby made a lien upon the said claim, and upon any draft, money, or evidence of indebtedness which may be paid or issued thereon."

In September, 1873, the commission awarded to McDonald, in satisfaction of his claim, the sum of $197,000.

In August, 1874, McDonald assigned the whole of this award to one William White.

In the following October these plaintiffs filed, in the supreme court of the District of Columbia, a bill in equity against McDonald and White, alleging therein that McDonald was indebted to them, under the agreement aforesaid, in the sum of $49,297.50, and that they had a lien to the extent of such sum upon the award in his favor. The bill prayed, among other things, that the defendants, McDonald and White, be restrained from assigning or collecting more than three-fourths of the amount of the award in McDonald's favor, and that a decree be entered establishing the complainants' lien upon the remaining one-fourth. Such proceedings were
136 thereafter had that one-half part of the sum so awarded was paid into court to meet the claim and lien of these plaintiffs.

Of the funds thus deposited, George W. Riggs, a banker in Washington, D. C., was appointed receiver. As such receiver, pursuant to the direction of the court, he invested such funds in certain bonds of the District of Columbia, guaranteed by the United States, and payable at its Treasury.

To the plaintiffs' bill the defendants interposed a demurrer, which was thereafter sustained. An amended complaint was met by a second demurrer, which was also sustained, and on June 24, 1875, a decree was entered dismissing the plaintiffs' bill with costs. On the same day the plaintiffs entered an appeal from that decree to the general term of the supreme court of the District of Columbia.

Four days later, (that is, on June 28, 1875,) another decree was entered in precise conformity with the earlier one, except that its contents were supplemented by a direction to the receiver to pay to the defendants, McDonald and White, the funds in his hands belonging to the cause.

Pursuant to such direction, and on the day of the entry of the decree wherein it was contained, the receiver delivered to McDonald the bonds in question, but not until he had first consulted the judge holding the court in which such decree had been entered, and been by him advised that that course was proper for him to pursue. McDonald on the same day sold and delivered the bonds to the banking firm of Riggs & Co., of which the receiver was a partner, obtaining upon such sale their then market value.

The bonds were promptly taken by Riggs & Co. to the Treasury

of the United States, and were there surrendered. In their place there were issued to Riggs & Co. certain new bonds, which were thereafter, in the month of December, 1875, sold and delivered to various purchasers. On July 2, 1875, these plaintiffs took an appeal to the general term of the supreme court of the District of Columbia from the aforesaid decree of June 28, 1875. On March 4, 1876, that decree, as well as the earlier decree of June 24, 1875, were
137 reversed with costs. The cause was remanded to the special term, with leave to the defendants in the action to answer the complainants' bill.

In May, 1876, McDonald and White interposed an answer, denying the validity of the complainants' claim. Upon the issues thus joined testimony was taken at diverse times during the years 1875 and 1876.

In June, 1877, the complainants obtained an order from the supreme court of the District of Columbia at general term, requiring the defendants, McDonald and White, to "pay over to the registry of the court" the sum of $49,297.50, which had been paid them by the receiver. This order was disobeyed, and thereupon the complainants, in September, 1877, moved the defendants, McDonald and White, to show cause "why they and each of them should not be punished for disobedience of the order as for a contempt." On December 8, 1877, the supreme court of the District of Columbia made a decree at general term, that "the rule upon the defendants to show cause why they should not be decreed to be in, and punished as for a contempt of court, &c., be made absolute, and that the said McDonald and White be taken and deemed to be in contempt of the aforesaid order," &c. Such decree further provided that "unless McDonald and White, within six days from the entry of this order, and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of June 19, 1877, and pay unto the said registry of this court the sum of $49,297.50, the answer filed by them in the cause be stricken out, and that this cause proceed as if no answer therein had been interposed; and that, until the said defendants shall comply with the said order of June 19, 1877, all proceedings on the part of said defendants in this cause be and the same are hereby perpetually stayed."

On December 29, 1877, the supreme court of the District of Columbia at general term, on motion of the complainants, and proof of non-compliance on the part of the defendants, McDonald and White, with the requirements of the decree of December 8, 1877, "ordered, adjudged, and decreed that the answer filed in this cause by the defendants, McDonald and White, be stricken out and
138 removed from the files of the court, and that this cause do proceed as if no answer herein had been interposed."

On February 12, 1878, the supreme court of the District of Columbia at general term made decree as follows:

"The answer of defendants having been removed from the files for their contempt in refusing to obey the order of court and deposit in the registry the sum of $49,297.50, it is now ordered, ad-

judged, and decreed that the bill be taken *pro confesso* against them."

On April 17, 1878, that order was made absolute by another order or decree which, after reciting material allegations in the complainants' bill as "standing without denial on the part of the defendants," ordered and adjudged "that the complainants have a lien upon the claim of Augustine R. McDonald against the United States * * * of $197,190, and upon any draft, money, evidence of indebtedness, or proceeds thereof."

The present action was commenced on April 16, 1884, one day less than six years after the entry of the decree last above mentioned.

It is claimed by the plaintiffs herein that Riggs & Co. were purchasers *pendente lite* of the bonds on which they (the plaintiffs) had a lien; that the evidence of that lien is conclusively establisned by the decree of the supreme court of the District of Columbia, and that their cause of action against the defendants accrued when that decree was entered, and at no earlier date.

The defendants on the other hand claim—

First. That at the time of the purchase of the bonds in question by Riggs & Co. there was no *lis* actually *pendens*.

Second. That the bonds were negotiable instruments transferable by mere delivery; that they were purchased by Riggs & Co. in good faith, and that the doctrine of *lis pendens* has here, therefore, no application.

Third. That even if the plaintiffs had a lien upon the bonds in question, and if such bonds were received and were subsequently sold by the defendants with knowledge of the plaintiffs'
139 claim, that lien was practically extinguished at the time of the sale, so that whatever cause of action they may have had against Riggs & Co. then accrued—that is to say, in December, 1875, more than six years before the commencement of this action, which is, therefore, barred, as these defendants claim, by the statute of limitations.

Fourth. That the supreme court of the District of Columbia exceeded its jurisdiction in making the aforesaid decree of April 17, 1878; that such decree is wholly void, and that, as it is the sole foundation of the plaintiffs' claim, the defendants are entitled to judgment.

First.

In support of the first of these four propositions urged in defendants' behalf, it is claimed that upon the entry of the decree of June 24, 1875, dismissing plaintiffs' bill the *lis* theretofore *pendens* utterly ceased so to be; that this decree of June 24 was vacated by the decree of June 28, from which no appeal was taken until July 2, four days after the purchase of the bonds by the defendants, and that, therefore, no *lis* was pending at the time such purchase was made.

These two decrees of June 24 and June 28 were both before the general term of the supreme court of the District of Columbia, and were both reversed by its decree of March 4, 1876; they are both

referred to by the Supreme Court of the United States in Hovey *v.* McDonald (109 U. S., 150), and their relation to each other is there commented upon.

At page 158, the judge, pronouncing the opinion of the court, says: "The correction of the form of the decree" (of June 24th) "by adding the direction to the receiver to pay over the money in his hands to the defendants was a thing of course. It was merely expressing the legal effect and consequences of the decree. It was an amendment which the court below was competent to make notwithstanding the appeal."

The decree of June 28 seems to have been entered without
140 notice to the complainants. Up to the time of its entry they had complied with all the requirements of the law necessary to give them a status as litigants in the pending cause. In the absence of a well-settled law or practice that would make such a finding necessary, I cannot hold that the entry of the supplementary or amendatory decree had the effect which defendants' counsel claim that it produced, of extinguishing such rights as complainants may theretofore have had under the doctrine of *lis pendens*. The decree of June 24 is indorsed, "Decree sustaining demurrer and dismissing bill;" that of June 28 is indorsed, "Order discharging receiver." These indorsements are not without significance as in some degree interpretative of the intended effect of the decrees in question, and their true significance. While there are some technical difficulties in upholding the plaintiffs' claim that the bonds were sold *pendente lite*, I have finally reached that conclusion.

Second.

Were the bonds here in question negotiable instruments? Each bond was in form a certificate to the effect that the District of Columbia was indebted unto a person therein named, or his "assigns," in a specified sum, payable at a specified date at the Treasury of the United States, with interest semi-annually; the certificate declares that the issuance of the bond is authorized by an act of Congress, which pledges the faith of the United States that the United States provide, by certain specified means, the revenues necessary to pay the interest on the bond and to create a sinking fund for paying the principal at maturity The Register of the Treasury certifies on each of these bonds that it has been registered in the office of such register in accordance with the provisions of the aforesaid act. On the back of the bonds there is a blank form of assignment, for the authorization of a transfer of the bond on the books in the office of the register, followed by a blank form of acknowledgment, which is in turn followed by a "note" explaining now the assignment
should be executed and acknowledged in case such execution
141 and acknowledgment should not be effected at the Treasury Department.

It appears in evidence that it has long been the custom of bankers and brokers dealing in these securities to pass them from hand to hand like negotiable paper, when properly indorsed, with an assignment in blank, so as to permit the registered holder to insert

at his pleasure the name of any person to whom he wishes the bonds to be transferred. The Supreme Court of the United States held in County of Wilson *v.* National Bank (103 U. S. 776) that "in order to make a promissory note or other obligation for the absolute payment of a sum certain on a certain day negotiable, it is not essential that it should in terms be payable to 'bearer' or 'order.' Any other equivalent expression, demonstrating the intention to make it negotiable, would be of equal force and validity." In White *v.* Vermont & Massachusetts R. R. Co. (21 How. 575) the same court also enunciated the rule that bonds which are intended by the obligor to be negotiable must be so regarded. Now, can it be fairly said that the maker of these bonds has indicated on their face an intention to give them the character of negotiable instruments? Bonds of the United States are issued in two forms. Some of them are registered on the books of the Treasury, and interest thereon is payable only to the person in whose name the registration is made, or to some other person in whom has been made a duly registered assignment. Bonds issued in the other form are payable to bearer, and the amounts of interest thereon, as they severally fall due, are indicated by coupons that may be detached at the pleasure of the holder. It was contended in Mechanics' Bank *v.* New York & New Haven R. R. Co. (13 N. Y. 599) that certificates of stock in the defendant corporation were to be regarded as negotiable instruments. In delivering the opinion of the court of appeals, Comstock, J., said (p. 623): "Aside from the absence of any language of these certificates which can impart to them a negotiable character, both the laws of the corporation and the certificates themselves contain special restrictions which seem to me to put this question at rest.
142 I do not suppose that a corporation, without something very extraordinary in its charter, can place such restraints upon the sale of its stock that the individual holder may not transfer as good a title in equity as he himself possesses, by any mode of assurance good upon general principles of law. But if a natural person has an undoubted right so to express the terms of his obligation that it shall not be negotiable in the commercial sense, or in any sense which can give to the purchaser a title superior to that of his vendor, I see no reason to doubt that corporations possess the same right. Has the defendant so expressed itself in these certificates of stock? I think it has. It has distinctly declared, both in its by-laws and on the face of the certificates, that shares can be transferred only on the books and on the surrender of the evidence of the previous owner's title." The fact that the company made the shares transferable only on its books, and on the surrender of the previous owner's title, seems to be regarded by our court of appeals as conclusive of its intention that the shares should not be negotiable.

In view of the fact that the bonds here in question contain a certificate of registration in the office of the Register of the Treasury, and prescribe the form of assignment by which they may be transferred on the books of that office, I hold that these bonds were not intended to be, and were not and are not, negotiable.

Third.

Is the plaintiffs' right of action barred by the statute of limitations?

This is the second trial of this suit. It was first tried before Hon. Edward Patterson, now a justice of the supreme court, as referee.

He found that the action was of such a character as to fall within the six-year limitation of the statute, and that the cause of action accrued more than six years before suit was brought.

And accordingly he gave judgment dismissing the complaint.

Upon appeal to the general term of the superior court this
143 judgment was affirmed. The opinion of Judge Ingraham in favor of affirmance was concurred in by Judges Sedgwick and Friedman. The judgment was subsequently reversed by the court of appeals upon the ground that the plaintiffs' right of action was not complete against the defendants until April 17, 1878, when the decree *pro confesso* was entered against McDonald and White, and that, therefore, the plaintiffs' action was not barred by the statute of limitations. The prevailing opinion in the court of appeals was written by Bradley, J., with whom concurred Judges Potter, Van, and Parker. Haight, J., wrote a dissenting opinion, and favored affirmance of the judgment below upon the ground that the cause of action arose at the time of the sale of the bonds by Riggs & Co. Judges Follett and Brown concurred in this dissent. It thus appears that of eleven judges who have heretofore passed upon this question, seven have found that the action is barred by the statute of limitations, and four have found that it is not. Those four, however, constituted a majority of one of the divisions of our court of appeals which pronounced the judgment of reversal, and of course, therefore, their view must now prevail unless there is some essential variations between the facts as they appear upon the present trial and the facts which were before the court of appeals when it ordered the reversal of the judgment entered on Judge Patterson's report.

It is claimed by counsel for the defendants that there is such essential variation.

They argue that the basis of Judge Bradley's conclusions was the finding of the former referee that the payment by McDonald to these plaintiffs of the sum stipulated in their agreement was "to be made a lien" upon the claim, etc., etc., and that if the learned judge had been advised by the appeal book of the precise terms of the agreement (as was not in fact the case) he would have taken a different view of the matter.

The agreement, after fixing the amount of the plaintiffs' compensation, provides that its payment "is hereby made a lien
144 upon the said claim." In its decree of April 17, 1878, the supreme court of the District of Columbia refer to the lien in these words: "The payment of which sum was agreed to be and made a lien on the said claim."

Referee Patterson granted the plaintiffs' third request to find at

the former trial, and found that the payment of the sum agreed on as the plaintiffs' compensation from McDonald "was made a lien upon the said claim and upon any draft," etc., etc.

In the course of his opinion in favor of reversing the judgment below, Judge Bradley says: "Plaintiffs' right to a lien existed in contract entered into before the award was made by the commission, by the terms of which the payment of their claim for services was to be made a lien upon it." Elsewhere he refers to the contract on which the plaintiffs rely as executory, and he then says: "The lien upon which the plaintiffs relied existed in executory contract and was cognizable in equity only until it was perfected, either by recognition or contract of McDonald, in terms making it so *in presenti* after performance by the plaintiff, or by decree to that effect." He says at a later stage of his opinion: "The contract in question may be treated as an agreement to give the plaintiffs a lien dependent upon the terms and conditions of the contract, and while it attached as a lien in equity upon the award when made, it was not, by force of the contract, made a specific lien *in presenti* or recognizable at law until it was perfected by the decree."

After careful consideration of the opinion of Judge Bradley, and of the action of the court of appeals upon the application of these defendants for a reargument, it seems to me that if the facts as they then appeared before the court had been precisely such as appear upon the present trial, its decision in the matter of the statute of limitations would not have been changed.

When Judge Bradley referred to the agreement as "executory" he had in mind, I think, the fact that the services with which the lien was associated were to be thereafter rendered, and that unless they should be in fact rendered the lien would be inoperative.

And the learned judge then proceeded to the conclusion that
145 the plaintiffs' lien could not become perfect until, after the services should have been in fact rendered, such lien should either be acknowledged by McDonald or recognized by decree. Acting upon that interpretation of the meaning of the decision of the court of appeals I feel bound to hold that this action is not barred by the statute of limitations.

Fourth.

Does the final decree of the supreme court of the District of Columbia entered on the 17th day of April, 1878, furnish sufficient support for its judgment in favor of these plaintiffs?

It is claimed in their behalf that their lien is conclusively established by such decree, and that, even if the supreme court of the District of Columbia was clearly in error in taking the steps which led up to the making of that decree, the error is one which can only be taken advantage of in a direct proceeding for its correction, and its existence must in this collateral proceeding be wholly disregarded.

The testimony shows that the bill of complaint in the District of Columbia action alleged the execution of the aforesaid agreement between the plaintiffs and the defendants, and the rendering of the

services called for by that agreement so as to perfect the plaintiffs' lien. It further shows that in May, 1876, an answer was interposed by the defendants, McDonald and White, denying that the plaintiffs had rendered any services under said agreement, and alleging that the execution of that instrument had been obtained by fraud. It shows, too, that testimony had been taken in the action by both the plaintiffs and defendants, and that when the cause came upon the calendar at special term in April, 1877, it was certified to the general term, there to be heard in the first instance.

I have already referred in detail to various proceedings in the supreme court of the District of Columbia between June, 1877, when McDonald and White were ordered to pay into the registry the sum of $49,297.50, and April, 1878, when, in disregard
146 of the answer of McDonald and White and of the testimony that had been taken in their behalf, that court entered judgment in accordance with the prayer of the complainants. There was no adjudication, nor was there pretence of adjudication, upon the actual merits of the matters in controversy, for the court had theretofore stricken the defendants' answer from the files, and had avowedly and distinctly pursued that course by way of punishing the defendants for their contempt in refusing to obey the court's order for the deposit of moneys in its registry.

Now, it is a well-settled doctrine of our Federal jurisprudence that the United States courts have no common-law jurisdiction, but such jurisdiction only as has been conferred upon them by statute. The statutory authority for punishment for contempts in those tribunals is limited to the imposition of a fine or of imprisonment.

Section 17, Judiciary act, 1789.
Revised Statutes U. S., § 725.
Section 34, act of February 21, 1871.
Anderson *v.* Dunn, 6 Wheat., 227.
Ex parte Robinson, 19 Wall., 512.

It seems clear that in pronouncing its decree of April 17, 1878, under the circumstances that I have already referred to, and after the striking of the defendants' answer from the files by way of punishment for their contempt, the supreme court of the District of Columbia transcended its authority.

Is its decree for that cause void?

McVeigh *v.* U. S. (11 Wall., 259) was decided upon the following state of facts: Certain property there in controversy had been seized by a United States marshal in 1863 and libelled for forfeiture upon the allegation that its owner had held an office of honor under the Confederate government, and that he had in various ways given aid and comfort to the rebellion. In response to the monition which had cited all persons interested in the property, or claiming an interest, to appear and make their allegations in that behalf, the owner had appeared and had filed claim and answer. The
147 district attorney thereafter moved that such claim, answer, and appearance be stricken from the files on the ground that

the claimant, as his answer disclosed, was, at the time of filing the same, "a resident within the city of Richmond, within the Confederate lines, and a rebel." The motion of the district attorney was granted; a decree of condemnation of forfeiture was entered, and the property was sold. The decree was subsequently affirmed by the circuit court, and thereafter the case was taken by writ of error to the Supreme Court of the United States. Mr. Justice Swayne, delivering the unanimous opinion of that court (11 Wallace, 259), said:

"In our judgment the district court committed a serious error in ordering the claim and answer to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

At a later day the validity of the same decree was brought collaterally in question in the case of Windsor *v.* McVeigh (93 U. S. p. 274), which was an action of ejectment. In delivering the opinion of the Supreme Court, Mr. Justice Field, after citing the language above quoted from the opinion of his associate justice, said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

148 "Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, 'Appear, and you shall be heard,' and when he has appeared, saying: 'Your appearance shall not be recognized, and you shall not be heard.' In the present case the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus entered with moderation; it was in fact a

mere arbitrary edict, clothed with the form of a judicial sentence. The law is and always has been that whenever notice or citation is required the party cited has a right to appear and to be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is, in legal effect, a recall of the citation to him. * * *

"The position of the defendants' counsel is that, as the proceeding for the confiscation of the property was one *in rem*, the court by seizure of the property acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause, and that its decree, however erroneous, cannot, therefore, be collaterally assailed. * * * The doctrine invoked by counsel that where a court has once acquired jurisdiction it has a right to decide every question which arises in a cause, and that its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. * * * Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments; it must act judicially in all things, and cannot then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment upon the
149 defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority. * * * So a departure from established modes of procedure will often render a judgment void; thus the sentence of a person charged with felony upon conviction by the court without the intervention of a jury would be invalid for any purpose. * * * The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent and character of its judgment, the law which is applicable to it. * * * It was not within the power of the jurisdiction of the district court to proceed with the case so as to affect the rights of the owner after his appearance had been stricken out and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing."

Mr. Justice Woods, delivering the opinion of the Supreme Court of the United States in United States *v.* Walker (109 U. S., 258), said: "Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

In the case just cited, the Supreme Court upheld a collateral

attack upon a decree of the supreme court of the District of Columbia. That court was authorized to hold terms for the transaction of orphans' court business; it was proceeding with the settlement of the account of an administratrix of a decedent's estate. Over that account, and over the administratrix herself, the court had unquestioned jurisdiction. The decedent had been administrator of another estate, not fully administered at the time of his death. An administrator *de bonis non* of such other estate had been appointed, and the decree directed the accounting administratrix to pay over to such administrator *de bonis non* a certain sum of money. The Supreme Court of the United States held that the administratrix *de bonis non* was not entitled to recover from
150 the accounting administratrix; that the supreme court of the District had exceeded its jurisdiction in making the order, and that the order was therefore void. This course was taken, not in a direct proceeding to review the decree, but in an action at law on the administrator's bond.

Upon these authorities, and numerous others to which I have been referred by counsel, I hold that the validity of decree of the supreme court of the District of Columbia may properly be inquired into in this action; and upon careful consideration of all the evidence, I am of the opinion that such decree is invalid for want of jurisdiction of the court wherein it was entered to enter the same; and because of this invalidity I find that the defendants herein are entitled to judgment.

DAN'L G. ROLLINS, *Referee.*

Summons.

Superior Court, City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs,
against
JOHN ELLIOTT, CHARLES C. GLOVER, THOMAS HYDE, and ADOLPHUS T. Kieckhoefer, Surviving Partners of Riggs & Company, Defendants.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer,
151 judgment will be taken against you by default for the relief demanded in the complaint.

Dated April 16, 1884.

THOMAS M. WHEELER,
Plaintiffs' Attorney.

Office and post-office address, No. 23 Pine St., room 11, New York, N. Y.

(Endorsed:) N. Y. superior court. Charles E. Hovey and William P. Dole ag'st John Elliott and others. Copy. Summons. Thomas M. Wheeler, plaintiffs' attorney, 22 Pine St., New York, N. Y. Filed Oct. 16, 1884.

Notice of Appearances and Demand.

Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs,
against
JOHN ELLIOTT and Others, Defendants.

Please to take notice that the defendant John Elliott appears in this action, and that I am retained by and appear for the said defendant in this action, and demand that a copy of the complaint and all other papers in this action be served on me at my office, No. 20 Exchange place, New York.

Dated May 7th, 1884.

Yours, &c.,

R. D. HARRIS,
Attorney for Defendants.

152 Office address: No. 20 Exchange place, New York city.

To Thomas M. Wheeler, Esq., attorney for plaintiffs, 22 Pine St.

(Endorsed:) N. Y. supreme court. Charles E. Hovey and ano. against John Elliott and others. Notice of appearance and demand. R. D. Harris, att'y for defendant John Elliott, 20 Ex. place. May 9th, 1884. Th. Wheeler, pl'ffs' att'y. Filed Oct. 16, 1884.

Superior Court, City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE
against
JOHN ELLIOTT, CHARLES C. GLOVER, THOMAS HYDE, and ADOLPHUS T. KIECKHOEFER, Surviving Partners of Riggs & Co.

The plaintiffs, complaining of the defendants, allege:

That the defendants, during the year 1875, and George W. Riggs were copartners, doing business as bankers under the firm name of Riggs & Company, at the city of Washington, in the District of Columbia, and at the city of New York; that the said George W. Riggs died on or about the — day of September, 1881. That Augustine R. McDonald had a claim against the United States pending before a commission commonly known as the Mixed Commission on British and American Claims; that the said McDonald agreed with the plaintiffs in writing, under seal, in consideration of the plaintiffs aiding him in the prosecution of said claim before said commission to pay to the

plaintiffs a sum equal to one-fourth of the amount which should be allowed on said claim, and that the plaintiffs should have
153 a lien therefor upon the said claim and upon any draft, money, or evidence of indebtedness which might be paid or issued thereon; that there was afterwards, about September, 1873, awarded by said commission upon said claim the sum of $197,190 in gold; that thereafter said McDonald pretended to have assigned the said claim to William White; that about the 2d day of October, 1874, the plaintiffs, having filed their bill of complaint therein, commenced an action against the said McDonald and White in the supreme court of the District of Columbia for the establishment of their lien aforesaid; that in said suit an injunction was issued restraining the said McDonald and White from collecting the amount of the said award; that afterwards in said suit, with the consent of all the parties thereto, an order was made that one-half of the net amount of said award should be paid to the said George W. Riggs, to hold the same subject to the claims, liens, and rights of the plaintiffs, and the said Riggs was ordered to invest the said amount in 3.65 bonds of the District of Columbia, guaranteed by the United States; that under said order the said Riggs received the sum of $107,012.87 and invested it in the said bonds of the District of Columbia, registered; that about the 28th June, 1875, the said McDonald obtained possession of the said bonds from the said Riggs without the consent of the plaintiffs, with intent to defraud the plaintiffs and deprive them of their claim, lien, and right therein, and with like intent simultaneously sold the said bonds to the said Riggs & Company, who purchased the same with full knowledge of the said fraud and of the claims, lien, and right of the plaintiff in and to the said bonds, and with full knowledge of the pendency of the said suit between the plaintiff and McDonald and White, and of the deposit of the said bonds with the said George W. Riggs under the order of the court as aforesaid.

That the plaintiff had no knowledge or means of knowing of the said purchase of the said bonds by the said Riggs & Company until the 17th day of June, 1878.

That in the said suit pending in the supreme court of the
154 District of Columbia between the plaintiffs and said McDonald and White, the plaintiffs on 17 April, 1878, obtained final judgment, when it was decreed that the plaintiffs have a lien upon the said claim of the said McDonald against the United States and upon any draft, money, evidence of indebtedness or proceeds thereof, and said judgment is now in full force and unreversed.

Wherefore the plaintiffs pray that the defendants may be declared and held to be trustees of the said bonds of the District of Columbia for the benefit of the plaintiffs; that it may be decreed that the plaintiffs have a lien and claim upon and right to the said bonds, and that the defendants purchased the said bonds subject to such lien, claim, and right to the extent of one-half of said bonds; that the defendants account to the plaintiff for the said bonds; that it may be ordered and decreed that the defendants deliver to the

plaintiffs one-half of said bonds and such further or other relief as in the premises may be just and equitable.

THOS. M. WHEELER,
Plaintiffs' Attorney.

DISTRICT OF COLUMBIA, *City of Washington,* } ss:

Charles E. Hovey, being duly sworn, says that he is one of the above-named plaintiffs; that he has read the foregoing complaint; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHAS. E. HOVEY.

Sworn and subscribed before me, a commissioner of deeds for the State of New York residing in the District of Columbia, at the city of Washington, in said District, this 17th day of *day of* May, A. D. 1884.

[COM. SEAL.]

SAM'L C. MILLS,
Com'r of Deeds for New York.

(Endorsed:) Superior court, city of New York. Charles E. Hovey *et al. v.* John Elliott *et al.* Copy complaint. Thomas M. 155 Wheeler, plaintiffs' attorney, 22 Pine St., New York. To R. D. Harris, attorney for def'd't Elliott, 20 Exchange place. Rec'd May 27, 1884. Filed Sept. 11, 1884.

Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs,
against
JOHN ELLIOTT, CHARLES C. GLOVER, THOMAS HYDE, and ADOLPHUS T. Kieckhoefer, Surviving Partners of Riggs & Company, Defendants.

The separate answer of the defendant, John Elliott, to the complaint of the plaintiffs, by R. D. Harris, his attorney, respectfully shows to this court:

First. The defendant admits that during the year 1875 the defendants above named and George W. Riggs were copartners, doing business under the firm name of Riggs & Company, at the city of Washington, in the District of Columbia, and at the city of New York, and that said George W. Riggs died on or about the — day of September, 1881.

Second. That as to the other matters and things set forth and alleged in said complaint this defendant has no knowledge or information sufficient to form a belief, and therefore controverts each and every said allegation in said complaint contained.

Third. That the defendant denies each and every allegation in said complaint contained, except as hereinbefore admitted or controverted.

Fourth. That for a further separate and distinct defence to this action, this defendant, upon his information and belief,
156 alleges that the cause of action alleged in said complaint did not arise within six years before the commencement of this action.

Wherefore this defendant prays that the complaint of the plaintiffs may be dismissed, with the costs and disbursements of this action.

R. D. HARRIS,
Attorney for Defendant John Elliott.

STATE OF NEW YORK, }
City and County of New York, } ss:

John Elliott, being duly sworn, says that he is one of the defendants in this action; that he has read the aforegoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN ELLIOTT.

Sworn to before me, this 22d day of July, 1884.

JOHN M. PHILBIN,
Notary Public, 13, *N. Y. Co.*

(Endorsed:) Superior court of the city of New York. Charles E. Hovey and William P. Dole against John Elliott, Charles C. Glover, Thomas Hyde, and Adolphus T. Kieckhoefer, surviving partners of Riggs & Co. Copy of answer of defendant, John Elliott. R. D. Harris, attorney for defendant John Elliott, 20 Exchange place, New York city. Filed Oct. 16, 1884.

157 At chambers of the superior court of the city of New York, held at the court-house, in the city of New York, this 1st day of September, 1884.

Present: Hon. H. C. Van *Horst*, judge.

CHARLES E. HOVEY and WILLIAM P. DOLE }
against
JOHN ELLIOTT and Others. }

On reading and filing the affidavit of Theodore Clarkson, hereto annexed, it is—

Ordered, that the defendant, John Elliott, file his amended answer herein with the clerk of this court within three days after the service of a copy of this order upon said defendant or his attorney.

A copy.

THOMAS BOESE, *Clerk.*

Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE
ag'st
JOHN ELLIOTT.

CITY AND COUNTY OF NEW YORK, *ss:*

Theodore Clarkson, managing clerk in the office of Thomas M. Wheeler, attorney for the plaintiff herein, being duly sworn, says that the amended answer of the defendant Elliott herein
158 was served on the 18th day of August, 1884; that deponent has this day been informed by the clerk of this court that the amended answer of said defendant has not been filed in his office.

THEODORE CLARKSON.

Sworn to before me, this 1st day of September, 1884.
WM. H. CLARKSON,
Notary Public for N. Y. Co.

(Endorsed:) N. Y. superior court. Charles E. Hovey and ano. ag'st John Elliott and o'rs. Copy affidavit and order that defendant file amended answer. Thos. M. Wheeler, pl'ffs' attorney, 22 Pine street, New York, N. Y. To R. D. Harris, attorney for defendant Elliott. Filed Oct. 16, 1884.

Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs,
against
JOHN ELLIOTT, CHARLES C. GLOVER, THOMAS HYDE, and Adolphus T. Kieckhoefer, Surviving Partners of Riggs & Company.

The separate amended answer of the defendant, John Elliott, to the complaint of the plaintiffs, by R. D. Harris, his attorney, respectfully shows to this court:

First. That this defendant denies each and every allegation in said complaint contained, except as hereinafter admitted or controverted.

Second. The defendant admits that during the year of 1875 the defendants above named and George W. Riggs were copartners, doing business under the firm name of Riggs & Company, at the city of Washington, in the District of Columbia, and at the
159 city of New York, and that said George W. Riggs died on or about the — day of September, 1881.

Third. That as to the other matters and things set forth and alleged in said complaint, this defendant has no knowledge or information sufficient to confirm a belief, and therefore controverts each and every said allegation in said complaint contained.

Fourth. For a further and separate defence to the cause of action in the complaint alleged:

This defendant denies any knowledge or information sufficient to form a belief as to whether Augustine R. McDonald in the complaint mentioned made the agreement in the complaint alleged with the plaintiffs, or whether the sum in the complaint alleged was awarded by said commission upon said claim, or whether the plaintiffs commenced an action for the establishment of any lien in their favor as in the complaint alleged.

This defendant alleges upon information and belief that in the action in the supreme court of the District of Columbia in the complaint herein mentioned, where the plaintiffs herein were plaintiffs, and McDonald and White were defendants, an order, judgment, and decree was duly made by said court on the 28th day of June, 1875, which said court then had jurisdiction of all the parties, and of the subject-matter of said action, and of said order, judgment, and decree, and of the receiver in the complaint herein mention-, George W. Riggs, whereby it was ordered, adjudged, and decreed that the bill of complaint of the plaintiffs in said action be dismissed with costs, and that the said receiver pay and deliver the funds by him held as said receiver to the defendants in said action, said McDonald and White.

That said receiver thereupon, in obedience to the terms of said order, judgment, and decree, paid and delivered to said McDonald and White all of the funds then in his hands as said receiver, and the bonds of the District of Columbia, wherein said funds had been by him invested, and that said order, judgment, and decree, as far as related to the matters decided, ordered, and adjudged between said receiver and said plaintiffs, did at all times remain unreversed and in full force and effect.

160 This defendant further alleges upon information and belief that thereafter in said action upon the petition of *of* said plaintiffs and the order of said court thereon made, said receiver did on the 17th day of June, 1878, file his account as said receiver, wherein and whereby he stated that he had paid to said McDonald and White the said funds and bonds, and that he had sold the same for said McDonald, and thereupon claims that he should be discharged from the order of said court from any liability to the plaintiffs on account thereof. That the plaintiffs thereupon on the first day of July, 1878, filed exceptions to the said account, whereby they claimed that the said receiver was still liable to the plaintiffs for and on *on* account of said funds and bonds and of his said payment thereof to said McDonald and White, and his said sale thereof for said McDonald. That thereafter said account, with the exceptions of the said plaintiffs thereto, were duly referred to an auditor by an order of said court, and said auditor thereafter filed his report on the fourth day of October, 1878, whereby he reported, discharging said receiver from all liability to the plaintiffs, and said report, together with the opposition and exceptions thereto of said plaintiffs, thereafter on the 22d day of January, 1879, came in for hearing before said court, and it was on said last date by said court duly ordered, adjudged, and decreed that the said exceptions of the plaintiffs be overruled, and said report be confirmed, and the order,

judgment, and decree last mentioned did thereafter at all times remain unreversed and in full force and effect, and that the sale of said bonds and the purchase thereof by the firm of Riggs & Company in the complaint mentioned were the same sale set forth in said account of said receiver and said report of said auditor.

This defendant has no knowledge or information sufficient to form a belief as to whether said McDonald obtained possession of said bonds with intent to defraud the plaintiffs and deprive them of any claim, lien, or right therein, or whether said McDonald with like intent sold said bonds.

161 This defendant alleges that the firm of Riggs & Company have no knowledge of any fraud by said McDonald or of any claim, lien, or right of the plaintiffs in or to said bonds, and upon information and belief alleges that the plaintiffs have no claim, lien, or right in or to said bonds.

This defendant further alleges upon information and belief that the plaintiffs have full knowledge and means of knowing of the purchase of said bonds by the firm of Riggs & Company on or about the 28th day of June, 1875, the day on which the same were so purchased.

Fifth. For a further and separate defence to the cause of action in said complaint alleged—

This defendant alleges that the cause of action in said complaint alleged did not accrue within six years prior to the commencement of this action.

R. D. HARRIS,
Attorney for Defendant Elliott,
20 *Exchange Place, N. Y. City.*

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

John Elliott, being duly sworn, says that he is one of the defendants in this action. That he has read the aforegoing amended answer and knows the contents thereof. That the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN ELLIOTT.

Sworn to before me, this 18th day of August, 1884.

JOHN M. PHILBIN,
Notary Public, 13, *N. Y. County.*

(Endorsed:) Superior court of the city of New York. Charles E. Hovey and William P. Dole, plaintiffs, against John Elliott, Charles C. Glover, Thomas Hyde, and Adolphus T. Kieckhoefer, surviving partners of Riggs & Co. Amended answer of John Elliott. R. D. Harris, attorney for defendant John Elliott, 20 Exchange place, New York city. Filed Sept. 4, 1884.

162 Superior Court, City of New York.

CHARLES E. HOVEY and Another
against
JOHN ELLIOTT and Others.

Please take notice that upon the pleadings herein I will move this court at a special term to be held at the special-term room thereof, in the court-house in the city of New York, on Monday, the 8th day of September, 1884, at ten o'clock a. m., or as soon thereafter as counsel can be heard, for an order for judgment upon the answer as frivolous, and such other and further relief as may be just.

New York, September 1, 1884.

THOS. M. WHEELER,
Plaintiffs' Attorney.

To R. D. Harris, Esq., attorney for John Elliott.

(Endorsed:) Superior court, city of New York. Charles E. Hovey and another ag'st John Elliott and others. Notice of motion for judgment. Thomas M. Wheeler, pl'ffs' att'y, 22 Pine St., New York, N. Y. To R. D. Harris, Esq., att'y for John Elliott. Filed Sept. 11, 1884.

Motion denied after argument, but without costs.
Dated 8th September, 1884.

H. C. V. V., *Judge.*

163 At a special term of the superior court of the city of New York, held at the county court-house in the said city on the 8th day of September, 1884.

Present: Hon. Hooper C. Van Vorst, judge.

CHARLES E. HOVEY and WILLIAM P. DOLE
against
JOHN ELLIOTT, CHARLES C. GLOVER, THOMAS HYDE, and ADOLPHUS T. Kieckhoefer, Surviving Partners of Riggs & Company.

The plaintiff having moved upon the pleadings herein for judgment upon the answer as frivolous, it is now, after hearing Thomas M. Wheeler, Esq., for the motion, and Edward M. Shepard, Esq., opposed,

Ordered, that the said motion be and it is hereby denied without costs.

H. C. V. V., *Judge.*

(Endorsed:) N. Y. superior court. Charles E. Hovey *et al.* ag'st John Elliott *et al.* Order denying motion for judgment. R. D. Harris, def'ts' att'y, 20 Exchange place, N. Y. city. Filed September 11, 1884.

164 *Notice of Trial.*

Superior Court, City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE
against
JOHN ELLIOTT and Others.

Please to take notice that the issues in this action will be brought to trial and an inquest taken therein at a special term of said court, appointed to be held in and for the city and county of New York, at the court-house in the said city, on the first Monday of October, 1884, at 11 o'clock of the forenoon of that day.

Dated the 11th day of September, 1884.

Yours, &c., THOS. M. WHEELER,
Attorney for Plaintiff, 22 *Pine St., New York, N. Y.*

To R. D. Harris, Esq., attorney for defendant Elliott.

(Endorsed:) N. Y. superior court. Charles E. Hovey and another ag'st John Elliott and others. Copy notice of trial for October term, 1884. Thos. M. Wheeler, plaintiffs' attorney, 22 Pine St., New York, N. Y. To R. D. Harris, Esq., attorney for defendant Elliott. Received September 11, 1884. Filed Oct. 16, 1884.

165 *Action in Equity.*

N. Y. Superior Court, Special Term.

CHARLES E. HOVEY and WILLIAM P. DOLE
vs.
JOHN ELLIOTT and Others.

T. M. Wheeler, attorney for plaintiffs.
R. D. Harris, attorney for defendant Elliott.
Issue of fact. Issue joined June 16, 1884. Plaintiffs' notice. No. of case on calendar 53.

Superior Court, Special Term.

Judge Richard O'Gorman.

Calendar for October Term, 1884.

Issues of fact.

Disposition of case: Off calendar, Oct. 10, 1884; removed to U. S. court.

No. 53. Title of case: Charles E. Hovey *et al. vs.* John Elliott. Names of attorneys: T. M. Wheeler, R. D. Harris.

Superior Court, City of New York.

CHARLES E. HOVEY and Another
against
JOHN ELLIOTT and Others.

Upon the amended affidavit of Thomas M. Wheeler, let
166 the defendants show cause before the special term of this court, to be held at the special-term room in the court-house, in the city of New York, on Monday, the 6th day of October, 1884, at ten o'clock a. m., or as soon thereafter as counsel can be heard, why a commission should not issue to examine William P. Dole, a witness on behalf of the plaintiffs, upon interrogatories and cross-interrogatories to be thereto annexed.

Service of a copy of this order on the attorney for the defendants on or before Saturday, the 4th day of October, inst., shall be sufficient.

CHARLES H. TRUAX, *Judge.*

CITY AND COUNTY OF NEW YORK, *ss:*

Theodore Clarkson, clerk in the office of Thomas M. Wheeler, attorney for the plaintiffs herein, being duly sworn, says that 3d day of October, 1884, at the office of R. D. Harris, attorney for the defendant herein, at No. 20 Exchange place, in the city of New York, he served the within affidavit and order to show cause on said Harris by delivering a copy thereof to a clerk in said Harris's office and leaving the same with him, at the same time exhibiting to him the within original order, said Harris being absent at the time.

THEO. CLARKSON.

Sworn to before me, this 4th day of October, 1884.

WM. H. CLARKSON,
Notary Public for N. Y. Co.

Superior Court, City of New York.

CHARLES E. HOVEY and Another
against
JOHN ELLIOTT and Others.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas M. Wheeler, being duly sworn, says that he is the attorney for the plaintiffs herein; that it is necessary for the
167 plaintiffs to have the testimony of William P. Dole, who is a citizen of the District of Columbia and is now temporarily residing at Berkeley Springs, in the District of Columbia.

That the above cause is at issue and upon the general calendar of this court; that it is an equity cause, and will probably, as this de-

ponent is informed by the clerk of this court, be on the day calendar for trial on Monday, October 6, 1884.

That no other application has been made for this order.

THOS. M. WHEELER.

Sworn to before me this 3d day of October, 1884.

THEO. CLARKSON,
Notary Public, N. Y. Co.

(Endorsed:) N. Y. supreme court. Charles E. Hovey and another ag'st John Elliott and others. Affidavit and order to show cause. Thos. M. Wheeler, pl'ffs' att'y, 22 Pine St., New York, N. Y. Due service of a copy of within is hereby admitted. New York, Oct. 3, 1884. Att'y for def't Elliott. Filed October 8, 1884.

Superior Court of the City of New York.

CHARLES E. HOVEY and Another
against
JOHN ELLIOTT and Others.

Interrogatories to be Propounded to William P. Dole, a Witness to be Examined on Behalf of the Plaintiffs.

First. What is your name, age, occupation, and place of business?

Second. What was your occupation from June 1, 1875, to July 1, 1878?

Third. During that period where did you reside?

168 Fourth. Were you one of the plaintiffs in the action commenced in the supreme court of the District of Columbia about October, 1874, wherein Charles E. Hovey and William P. Dole were plaintiffs, and Augustine R. McDonald and William White were defendants?

Fifth. When did you first discover that George W. Riggs, receiver in the said suit, had invested the funds in his hands in 3.65 bonds of the District of Columbia, guaranteed by the United States?

Sixth. When did you first discover that the said Riggs had delivered the said bonds to the said McDonald and White?

Seventh. When did you first discover that the said McDonald sold the said bonds to Riggs & Company?

Eighth. When did you first discover that the said McDonald, immediately after the sale of the said bonds, left the District of Columbia, and did not again return there?

Ninth. When did you first discover the purchase of the said bonds by the said Riggs & Company?

(Endorsed:) N. Y. superior court. Charles E. Hovey and ano'r ag'st John Elliott and o'rs. Copy proposed interrogatories. Filed Oct. 16, 1884. Thomas W. Wheeler, pl't'ffs' att'y, 22 Pine St., New York, N. Y. Sir: Please to take notice that the within is a copy of

the interrogatories proposed to be annexed to the commission to take the testimony of William P. Dole, a witness on behalf of the plaintiffs herein. New York, Oct. 4, 1884. Yours, &c., Thos. M. Wheeler, pl't'ffs' att'y, 22 Pine St., New York, N. Y. To R. D. Harris, Esq., att'y for def't Elliott.

169 Superior Court, City of New York.

At a special term of said court held at the special-term room in the court-house in the city of New York, on Monday, the 6th day of October, 1884.

Present: Honorable Richard O'Gorman.

CHARLES E. HOVEY and Another
against
JOHN ELLIOTT and Others.

An order having been made for the defendants to show cause why a commission should not examine William P. Dole on behalf of the plaintiffs, and R. D. Harris, the attorney for the defendant, John Elliott, having been called and not appearing, and there being no appearance for the other defendants and filing the said order to show cause, it is ordered that a commission issue, and of and under the seal of this court, with interrogatories to be thereto annexed, directed to J. H. B. Dawson, clerk of county court of Morgan county, of Berkeley Springs, in the State of Virginia, in accordance with the provisions of the code of civil procedure.

RICHARD O'GORMAN, *J.*

(Endorsed:) Superior court, city of New York. Charles E. Hovey and another against John Elliott and others. Order for commission to examine Wm. P. Dole. Thomas M. Wheeler, attorney for plaintiff-, 22 Pine St., New York, N. Y. Filed Oct. 8, 1884.

170 Superior Court of the City of New York.

CHARLES E. HOVEY and Another
ag'st
JOHN ELLIOTT and Others.

Upon the papers on file in this action, it is ordered that the plaintiffs or their attorney show cause before me at special term or chambers of this court at 3 o'clock p. m. of this 9th day of October, 1884, why the order for commission entered herein on Oct. 6 and filed Oct. 8 should not be vacated.

Service hereof immediately shall be sufficient.

RICHARD O'GORMAN, *J.*

STATE OF NEW YORK,
City and County of New York, } *ss:*

John M. Philbin of said city, being duly sworn, doth depose and say that on the 9th day of October, A. D. 1884, he served the within

order on Thos. M. Wheeler, Esq., plaintiff's attorney herein, by handing to and leaving with said Thos. M. Wheeler a copy of said order and at the same — showing him the original thereof.

JOHN M. PHILBIN.

Sworn to before me, this 9th day of October, 1884.

J. CHALMERS OVERTON,
Notary Public, Kings Co., N. Y.

Certificate filed in N. Y. Co.

(Endorsed :) Superior court of the city of New York. Charles E. Hovey and ano. ag'st John Elliott and others. Order to show cause. R. D. Harris, 20 Ex. place, att'y for def't Elliott. Filed Oct. 9, 1884.

171 At a special term of the superior court held in and for the city of New York, held at the court-house in the city of New York.

CHARLES E. HOVEY and Another
against
JOHN ELLIOTT, Impleaded with Others.

An order to show cause having been made requiring the plaintiffs or their attorney to show cause why the order for commission dated October 6th, 1884, and filed October 8th, 1884, should not be vacated,

Now, on hearing R. D. Harris, Esq., in favor of said motion, and it appearing on the face of said order that it does not conform to the order to show — under which it was granted, and was —,

It is ordered that said order for commission dated October 6th, 1884, and filed October 8th, 1884, be vacated and set aside; and

It is further ordered that the commission issued under said order to —— —— be vacated and set aside, and that said commission as returned executed be stricken from the files of this court.

RICHARD O'GORMAN, *J.*

(Endorsed :) Superior court. Charles E. Hovey & ano. ag'st John Elliott & others. Order. R. D. Harris, att'y for def't Elliot. Filed Oct. 9, 1884.

172 Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE
against
JOHN ELLIOTT, CHARLES C. GLOVER, THOMAS HYDE, and ADOLPHUS T. KIECKHOEFER, Surviving Partners of Riggs & Company.

To the honorable the superior court of the city of New York:

The petition of John Elliott, of the city, county, and State of New York, respectfully shows that your petitioner is one of the defendants in this suit.

That the matter and amount in dispute in this suit exceeds, exclusive of costs, the value or sum of five hundred dollars.

That this action was brought by the above-named plaintiffs against your petitioner, impleaded with Charles C. Glover, Thomas Hyde, and Adolphus T. Kieckhoefer, who, with your petitioner, are the surviving partners of the firm of Riggs & Company; that the summons herein was served in or about the month of May, 1884, and complaint herein was served on the 27th day of May, 1884; that no other of the defendants has been served with process herein, nor is either of said defendants a citizen or resident of the State of New York, but that this action is being prosecuted against your petitioner alone of the defendants.

That the plaintiff Hovey is and was at the time this suit was brought a citizen and resident of the District of Columbia; that the plaintiff Dole is and was at the time this suit was brought a citizen and resident of the State of West Virginia; that your petitioner is and was at the time this suit was brought a citizen and resident of the State of New York; and that in this suit there is a con-
173 troversy between the said plaintiffs and your petitioner concerning certain property which the said plaintiffs claim as against the firm of Riggs & Company, of which your petitioner was a member; and that the said controversy can be fully determined as between the said plaintiffs and your petitioner without the presence of the other defendants as parties in the cause, and is now existing and in course of determination by and between the said plaintiffs and your petitioner alone.

And, further, that this suit arises in part under the Constitution or laws of the United States or treaties made under their authority, inasmuch as it is alleged in the complaint herein, among other things, as follows:

"That Augustine R. McDonald had a claim against the United States pending before a commission commonly known as the Mixed Commission on British and American Claims; that the said McDonald agreed with the plaintiffs in writing under seal, in consideration of the plaintiffs aiding him in the prosecution of said claim before said commission, to pay to the plaintiffs a sum equal to one-fourth of the amount which should be allowed on said claim, and that the plaintiff- should have a lien therefor upon the said claim and upon any draft, money, or evidence of indebtedness which might be paid or issued thereon; that there was afterwards, about September, 1873, awarded by said commission upon said claim the sum of $197,190 in gold."

That said commission was formed and organized under the treaty concluded at Washington on the eighth day of May, 1871, by and between the United States and Great Britain, and commonly known as the treaty of Washington.

That the aforegoing allegations of said complaint are, among the other allegations in said complaint, denied or controverted by the answer of the defendant your petitioner, and that the controversy between the said plaintiffs and your petitioner turns partially upon the true and proper construction of the decision of the said tribunal,

acting under said treaties, concerning the claim of one Augustine R. McDonald, under whom the plaintiffs claim.

174 And, further, respectfully shows that this cause has not yet been tried, but that the same is pending for trial, and that the term of this court at which said cause could be first tried is the present term of this court, which was appointed to be held on the first Monday of October, at the city hall in the city of New York; and that your petitioner desires to remove this suit before trial thereof into the next circuit court of the United States to be held in and for the southern district of New York in pursuance of the provisions of law contained in the act of Congress approved March 3, 1875, entitled, "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes."

And your petitioner respectfully offers herewith a bond with good and sufficient surety for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and for his doing all other acts and things required to be done by the said provisions of law upon the removal of actions into the circuit court of the United States.

And your petitioner therefore respectfully prays that the said bond may be accepted as good and sufficient surety according to the said provisions of law and that the said suit may be removed into the next circuit court of the United States to be held in and for the southern district of New York, pursuant to the statute of the United States in such case made and provided, and that no other proceedings may be had therein in this court.

And your petitioner will ever pray, etc.

JOHN ELLIOTT.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, John Elliott, being duly sworn, do say that I am the petitioner in the petition in the above-entitled cause.

That I have read the foregoing petition and know the con-
175 tents thereof, and that the statements and allegations therein contained are true, as I am informed and verily believe.

JOHN ELLIOTT.

Subscribed by the said John Elliott in my presence and by him sworn to before me this 9th day of October, 1884.

JOHN A. HILLERY,
Notary Public, N. Y. Co.

(Endorsed:) Superior court of the city of New York. Charles E. Hovey and William P. Dole ag'st John Elliott, Charles C. Glover, Thomas Hyde, and Adolphus T. Kieckhoefer, surviving partners of Riggs & Company. Petition for removal of counsel to U. S. circuit court. R. D. Harris, attorney for petitioner. Filed Oct. 9, 1884.

Know all men by these presents that we, John Elliott, of New York, in the State of New York, as principal, and Alexander Elliott, of the county of Queens, and George Elliott, of the city of New York, as sureties, are held and firmly bound unto Charles E. Hovey and William P. Dole in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Charles E. Hovey and William P. Dole, their heirs and assigns. We bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents;

Yet upon these conditions: that said John Elliott having petitioned the superior court of the city of New York, in the State of New York, for the removal of a certain cause therein pending wherein Charles E. Hovey and William P. Dole are plaintiffs and John Elliott, impleaded with others, are defendants, to the circuit court of the United States in and for the southern district of New York:

Now, if the said John Elliott, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was
176 wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

JOHN ELLIOTT. [L. S.]
ALEX. ELLIOTT. [L. S.]
GEO. ELLIOTT. [L. S.]

STATE OF NEW YORK, }
City and County of New York, } ss:

Alexander Elliott, one of the subscribers to the foregoing bond, being duly sworn, says that he is a resident and freeholder within this State and is worth the sum of three thousand dollars over all his debts and liabilities and exclusive of property exempt by law from execution; and he has property in the State of New York liable to execution of the value of more than three thousand dollars.

ALEX. ELLIOTT.

Subscribed in my presence by Alexander Elliott and by him sworn to before me this 8th day of October, 1884.

[SEAL.] JOHN M. PHILBIN,
Notary Public, 13, *N. Y. Co.*

STATE OF NEW YORK, }
City and County of New York, } ss:

George Elliott, one of the subscribers to the foregoing bond, being duly sworn, says that he is a resident and freeholder within this State and is worth the sum of three thousand dollars over all his debts and liabilities and exclusive of property exempt by law from execution, and that he has property in the State of New York liable to execution of the value of more than three thousand dollars.

GEO. ELLIOTT.

Subscribed in my presence by George Elliott and by him sworn to before me, this 8th day of October, 1884.

[NOTARY'S SEAL.] JOHN M. PHILBIN,
Notary Public, 13, *N. Y. Co.*

177 STATE OF NEW YORK, } ss:
City and County of New York, }

I certify that on this eighth day of October, 1884, before me personally appeared the above-named John Elliott, George Elliott, and Alexander Elliott, all to me known and known to me to be the individuals described in and who executed the above bond, and severally acknowledged that they executed the same.

[NOTARY'S SEAL.] JOHN M. PHILBIN,
Notary Public, 13, *N. Y. Co.*

(Endorsed:) Superior court of the city of New York. Charles E. Hovey & ano. ag'st John Elliott, impleaded. Bond for removal. R. D. Harris, att'y for def't Elliott. "Accepted." Richard O'Gorman, J. Oct. 9, 1884. Filed Oct. 9, 1884.

All of which we have caused by these presents to be exemplified and the seal of the superior court of the city of New York to be hereunto affixed.

Witness Richard O'Gorman, Esq., presiding judge of our said court, at the city hall of the city of New York, this 18th day of October, A. D. 1884.

THOS. BOESE, *Clerk.*

Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE }
against
JOHN ELLIOTT and Others. }

I, Richard O'Gorman, presiding judge of the superior court of the city of New York, do hereby certify that Thomas Boese,
178 whose name is subscribed to the preceding exemplification, is the clerk of the superior court, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said exemplification is the seal of the said superior court of the city of New York, and that the attestation thereof is in due form of law.

Dated New York, Oct. 18th, 1884.

RICHARD O'GORMAN, *J.*,
Presiding Judge of the Superior Court of the City of New York.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, Thomas Boese, clerk of the superior court of the city of New York, do hereby certify that Richard O. Gorman, whose name is

subscribed to the preceding certificate, is the presiding judge of the superior court of the city of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof, I have hereto set my hand and [SEAL.] affixed the seal of the said court, this 18th day of October, 1884.

THOS. BOESE, *Clerk.*

(Endorsed:) New York superior court. Charles E. Hovey and ano. against John Elliott and others. Exemplified copy of record. U. S. circuit court. Filed Oct. 18, 1884. Timothy Griffith, clerk.

179 At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court-rooms, in the post-office building, in the city of New York, in said district, on the 23d day of October, 1884.

Present: Honorable William J. Wallace, circuit judge.

CHARLES E. HOVEY *et al.*
vs.
JOHN ELLIOTT *et als.*
} In Equity.

A motion having been made, upon the record, to remand the said cause to the superior court of the city of New York—

Now, after hearing Thomas M. Wheeler in support thereof and William G. Choate in opposition thereto—

It is ordered that the said cause be, and the same is hereby, remanded to the superior court of the city of New York, with twenty-five dollars costs.

WM. J. WALLACE.

(Endorsed:) United States circuit court, southern district of New York. In equity. Charles J. Hovey *et al. vs.* John Elliott *et als.* Order remanding cause. Thomas M. Wheeler, solicitor for pl'ffs, 22 Pine St., New York city, U. S. circuit court. Filed Oct. 28, 1884. Timothy Griffith, clerk.

180 At a general term of the superior court of the city of New York, held at the court-house in the city of New York, on the 27th day of October, 1892.

Present: Hon. John J. Freedman, Ch. J.
Hon. P. Henry Dugro,
Hon. D. A. Gildersleeve, JJ.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs, Appellants,
against
GEORGE ELLIOTT and GEORGE D. ELLIOTT, as Executors, &c., of John Elliott, Deceased, and Others, Defendants, Respondents.

An appeal having been taken by the plaintiffs herein to the general term of this court from a judgment entered in this action on May 14th, 1892, in favor of the defendants and against the plain-

tiffs, dismissing the complaint in this action, with costs and for $5,538.18 costs, and the appeal having been heard upon the record, and Defendants' Exhibit No. 1 attached thereto, and part thereof, after hearing Thomas M. Wheeler, Esq., of counsel for plaintiffs, appellants, and William G. Choate, Esq., of counsel for defendants, respondents, and due deliberation having been had; now, upon motion of R. D. Harris, Esq., attorney for defendants, respondents,

It is ordered, that the judgment entered in this action on May 14th, 1892, in favor of the defendants and against the plain-
181 tiffs, dismissing the complaint herein, with costs, and for $5,538.18 costs, be, and the same hereby is, affirmed, with costs.

Enter.

H. A. G., *J.*

Superior Court of the City of New York.

CHARLES E. HOVEY and WILLIAM P. DOLE, Plaintiffs, Appellants,
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors, &c., of John Elliott, Deceased, Defendants, Respondents.

An appeal having been taken by the plaintiffs herein to the general term of this court from the judgment entered in this action on May 14th, 1892, in favor of the defendants and against the plaintiffs, dismissing the complaint in this action, with costs, and for the sum of $5,538.18 costs, and the appeal having been heard upon the record and Defendants' Exhibit No. 1 attached thereto and part thereof, and the said judgment having been in all things affirmed, with costs, and the costs having been taxed at the sum of one hundred and eighty-eight $\frac{6}{100}$ dollars

It is ordered, adjudged and decreed, that the said judgment entered on May 14th, 1892, be and the same is hereby affirmed,
182 and that the said George Elliott and George L. Elliott, as executors of the last will and testament of John Elliott, deceased, defendants, respondents, have judgment against the said Charles E. Hovey and William P. Dole, plaintiffs, appellants, for the sum of one hundred and eighty-eight $\frac{6}{100}$ dollars, and have execution therefor.

THOMAS BOESE, *Clerk.*

A copy.
[SEAL.] THOMAS BOESE, *Clerk.*

Superior Court, City of New York.

CHARLES E. HOVEY and Another, Appellants,
against
GEORGE ELLIOTT and Another, Executors, &c., Respondents.

Please take notice, that the plaintiff, Charles E. Hovey, appeals to the court of appeals from the judgment entered herein on the

7th day of November, 1892, affirming the judgment entered herein on the 14th day of May, 1892, and for $188.06 costs.

New York, November 7, 1892.

THOMAS M. WHEELER,
Plaintiffs' Attorney.

To R. D. Harris, defendants' attorney; Thomas Boese, clerk of said court.

A copy.
[SEAL.] THOMAS BOESE, *Clerk.*

183 Superior Court, City and County of New York, General Term.

CHARLES E. HOVEY and Another, Appellants,
against
GEORGE ELLIOTT and Another, Executors, &c., Respondents.

Per Curiam:

Upon the case, as now presented, the right of the plaintiff- to any relief whatever rests upon the alleged decree of the supreme court of the District of Columbia, entered on the 17th day of April, 1878. The referee found that the decree was invalid for want of jurisdiction of the court wherein it was entered to enter the same.

The question of the validity or invalidity of the decree must be determined by the laws of the United States and by the interpretation of those laws by the Supreme Court of the United States. Whether a decree of the same character, made under the same circumstances by a court of the State of New York or any other State, would or would not be valid, is an immaterial question, if under the decisions of the Supreme Court of the United States, the decree was one which a Federal court was incompetent to make. Upon a careful examination of all that has been cited upon this point by both parties, we are of the opinion that the learned referee reached the right conclusion.

184 The judgment should be affirmed with costs upon that part of the opinion of the referee which relates to the question of jurisdiction.

185 STATE OF NEW YORK:

Court of Appeals.

CHARLES E. HOVEY and Another, Plaintiffs, Appellants,
against
GEORGE ELLIOTT and Another, Executors, etc., Defendants, Respondents.

The plaintiff Charles E. Hovey, by Frederick S. Duncan, his attorney, hereby suggests to the court that his coplaintiff, William P. Dole, joint plaintiff with the said Charles E. Hovey in the above-

entitled action, died since the former appeal in this cause to this court, leaving said Charles E. Hovey sole surviving plaintiff herein.

FREDERICK S. DUNCAN,
Attorney for Plaintiff, 120 *Broadway, N. Y. City.*

186 [Endorsed :] State of New York, court of appeals. Charles E. Hovey and another against George Elliott and another, as executors, etc. Suggestion of death of William P. Dole. Frederick S. Duncan, plaintiffs' attorney, 120 Broadway, N. Y. city. Filed January 10th, 1895.

187 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 26th day of February, in the year of our Lord one thousand eight hundred and ninety-five, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur February 26th, 1895.

CHARLES E. HOVEY and Another, Appellants,
vs.
GEORGE ELLIOTT and Another, Executors, &c., Respondents.

Be it remembered that on the 27th day of November, in the year of our Lord one thousand eight hundred and ninety-three, Charles E. Hovey, the appellant in this action, came here into the court of appeals, by Thomas M. Wheeler, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the superior court of the city of New York; and George Elliott and another, executors, &c., the respondents in said action, afterwards appeared in said court of appeals, by
188 R. D. Harris, their attorney, which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

And thereafter, to wit, August 29th, 1894, an order was duly entered in the above-entitled action substituting Frederick S. Duncan as appellant's attorney therein in the place and stead of Thomas M. Wheeler, deceased.

Whereupon the said court of appeals, having heard this cause argued by Mr. Herbert B. Titus and Mr. Everett P. Wheeler, of counsel for the appellant, and by Mr. John Selden and Mr. William G. Choate, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the said superior court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the re-

spondents recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said superior court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals re-
189 mitted into the superior court of the city of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said superior court before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *February 26th*, 1895.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS, *Clerk.*

190 CHARLES E. HOVEY, as Survivor, etc., Appellant,
v.
GEORGE ELLIOTT *et al.*, Executors, etc., of John Elliott, Deceased, *et al.*, Respondents.

(Decided February 26, 1895.)

Appeal from a judgment of the general term of the superior court of the city of New York affirming a judgment entered upon the report of a referee.

Herbert B. Titus and Everett P. Wheeler, for appellant.
Wm. G. Choate and John Selden, for respondents.

HAIGHT, *J.:*

This action was brought to have the defendants' testator adjudged to be a trustee of certain bonds for the benefit of the plaintiffs, and that they have a lien thereon, and that the defendants account to them therefor.

In September, 1873, the Mixed Commission on British and American Claims, sitting at the city of Washington, awarded to one Augustin R. McDonald the sum of $197,000 in satisfaction of his claim for cotton destroyed during the war of the rebellion. In the following October the plaintiffs filed in the supreme court of the Dis-

trict of Columbia a bill in equity against McDonald and one William White, his assignee, for the sum of $49,297.50, alleging therein that McDonald was indebted to them under an agreement whereby, in consideration of services to be rendered in the prosecution of such claim, they were to receive a sum equal to twenty-five per centum of the amount that should be recovered, and that they have a lien to the extent of such sum upon the award in his favor. Such proceedings were thereafter had that one George W. Riggs, a
191 banker in the city of Washington, was appointed receiver and one-half of the sum so awarded was paid over to him as such to meet the claim and lien of the plaintiffs. As such receiver and pursuant to the directions of the court he invested the funds in certain bonds of the District of Columbia guaranteed by the United States and payable at its Treasury. The defendants then interposed a demurrer to the plaintiffs' bill, which was sustained, and on the 24th day of June, 1875, a decree was entered dismissing the plaintiffs' bill with costs. On the same day the plaintiffs entered an appeal from the decree to the general term of the supreme court of the District of Columbia. On June 28th, 1875, another decree was entered in precise conformity with the former decree, but supplemented by a direction to the receiver to pay to the defendants McDonald and White the funds in his hands as such receiver. On the same day McDonald and White called upon the receiver and demanded the bonds in question. He thereupon first consulted with the judge holding the court in which the decree was entered, and, after being advised by such judge that the bonds should be surrendered, he delivered them over to McDonald and White, who on the same day sold and delivered the bonds for full value to the banking firm of Riggs & Co., of which the receiver was a partner. Riggs & Co. then surrendered the bonds to the Treasury of the United States, receiving new bonds therefor, which were thereafter sold and delivered to various purchasers.

On July 2nd, 1875, the plaintiffs took an appeal to the general term of the supreme court of the District of Columbia from
192 the decree of June 28, 1875, and on March 4, 1876, that decree, as well as the one that preceded it, was reversed, and the cause was remanded to the special term, with leave to the defendants to answer. An answer was then interposed, and upon the issues raised thereby testimony was taken at divers times during the years 1876 and 1877. On the 15th day of June, 1877, plaintiffs obtained an order from the supreme court of the District of Columbia requiring the defendants McDonald and White to pay over to the registry of the court the sum which had been delivered to them by the receiver. This order was not complied with, and thereupon the plaintiffs moved that the defendants McDonald and White show cause why they and each of them should not be punished as for a contempt; and such proceedings were thereupon had that they were adjudged to be guilty of a contempt, and that the answer filed by them in the cause be stricken out and removed from the files of the court. Judgment was thereafter entered against them *pro confesso*, adjudging that the plaintiffs had a lien upon the bonds.

This action is based upon the judgment so entered and is prosecuted upon the theory that notice to Riggs of the pendency of the action was notice to all of his partners (Weetjen *v.* St. P. & P. R. R. Co., 4 Hun., 529; 3 Kent Com., 105). The defendants' testator resided in the city of New York and was one of the members of the banking firm of Riggs & Co. He only was served with summons in this action.

The referee has found, as conclusions of law, "First, that, in
193 order to enable the plaintiffs to sustain this action, the decree rendered by the supreme court of the District of Columbia must be a valid decree, binding upon the defendants; second, that from the operation of that decree the defendants in this action enjoy exemption and immunity under section 725 of the Revised Statutes of the United States; third, that from the effect and operation of the decree the defendants enjoy immunity and exemption under that provision of the fifth amendment to the Constitution of the United States which prohibits the deprivation of property without due process of law; fourth, that the supreme court of the District of Columbia had no jurisdiction to render the said decree, and that the same was and is null and void," etc.

As to the first conclusion of law the parties agree. The controversy is in reference to the other three. The third conclusion is based upon the fifth amendment to the Constitution of the United States, which prohibits the deprivation of persons of property without due process of law. Inasmuch as the consideration of what is due process of law will to some extent be involved in the determination of the validity of the judgment upon which this action is based, we only deem it necessary to consider the second and fourth conclusions of law found by the referee. We shall also, for the purpose of this review, assume, without deciding the question, that Riggs & Co. were purchasers of the bonds *pendente lite*, with knowledge of the existence of the suit, although it appears that the purchase was made after judgment, for full value, in good faith, under the sup-
position that they had the right to purchase freed from all
194 liens, and that they had no notice that an appeal had been taken. Considering them as such purchasers, were they bound by the determination made in the action then pending? Section 725 of the United States Revised Statutes provides that—

"The said courts (referring to the courts of the United States) shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the said courts."

Under this statute the referee has reached the conclusion that the supreme court of the District of Columbia had no power to punish

the defendants for a contempt by striking out their answer and adjudging that the plaintiffs had a lien upon the bonds.

In *Ex parte* Robinson (19 Wall., 512), Field, J., in delivering the opinion for the court, says: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the
195 United States were called into existence and invested with jurisdiction over any subject they became possessed of this power, but the power has been limited and defined by the act of Congress of March 2, 1831. The act in terms applies to all courts. Whether it can be held to limit the authority of the supreme court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt, but that it applies to the circuit and district courts there can be no question. These courts were created by an act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempt may be inflicted. It limits the power of these courts in this respect to three classes of cases. * * * The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the judiciary act of 1789 declares that the courts shall have power to punish contempts of their authority in any cause or hearing before them by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treating it as a punishment for a contempt, was, therefore, unauthorized and void."

In Anderson *v.* Dunn (6 Wheat., 204–227) Johnson, J., says: "It is true that the courts of justice of the United States are vested
196 by express statute provision with power to fine and imprison for contempt. * * * It is a legislative assertion of this right as incidental to the grant of judicial power, and can only be considered authority as an instance of abundant caution or a legislative declaration that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."

In U. S. *ex rel.* D. & N. O. R'y Co. *v.* Atchison, T. & S. F. R'y Co. (16 Fed. R., 583), McCrary, J., says: "The power of the court is limited to the punishment of the party charged with contempt, and under the provisions of section 725 of the Revised Statutes of the United States such punishment must be by fine or imprisonment. That section provides that circuit courts shall have power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. This enactment, says the Supreme Court, is a limitation upon the manner in which the power may be exercised, and must be held to be a negation of all other modes of punishment." (Citing *Ex parte* Robinson, *supra.*)

In U. S. *ex rel.* South. Ex. Co. *v.* Memphis & Little Rock R. Co. (6 Fed. R., 237–239), Hammond, J., says: "Obedience to an injunction against privileged persons and corporations was sometimes enforced by sequestration, which placed the property of the contemnor in custody until obedience was given (2 Daniell Ch. Pr. (5th ed.), 1685, 1687; 2 Bish. Cr. L. (6th ed.), 241, 273; Spokes *v.* Bunbury Board of Health, L. R. (1 Eq.), 42, and cases cited by these authorities). Our Revised Statutes, taken from the act of March 2, 1831, c. 99, and prior acts of Congress, have prescribed the mode of
197 punishment, and directed that it shall be by fine or imprisonment, and this operates as a negation of all other modes of punishment." (See, also, *In re* Cary, 10 Fed. R., 622, 625; *In re* Graves, 29 *id.*, 60; Interstate Commerce Com. *v.* Brimson, 154 U. S. R., 447–489; *Ex parte* Bradley, 7 Wall., 364.)

It may be that the cases above referred to are not in strict accord with the rule recognized in this State in which a court of equity may refuse to a party in contempt the benefit of proceedings pending in it when asked by him as a favor until he has purged himself of his contempt (Brinkly *v.* Brinkly, 47 N. Y., 40; Walker *v.* Walker, 82 *id.*, 260; Gross *v.* Clark, 87 *id.*, 272). But in this State the supreme court on its equity side is invested by the Constitution with all the power and authority that formerly existed in the high court of chancery in England, the common law remaining in force excepting so far as it has been changed by statute. The legislature in this State, therefore, may not be able to limit or deprive the supreme court of any of its jurisdiction or powers.

Has the supreme court of the District of Columbia like jurisdiction and powers? It was created by act of Congress and not by the Constitution. It consequently follows that Congress, which gave it life and invested it with power, may restrict and limit its exercise, and this notwithstanding the fact that it may have given it general jurisdiction in law and equity. To Congress is given the exercise of exclusive legislation in all cases whatsoever over such district as may by cession of particular States and the acceptance of
198 Congress become the seat of Government of the United States (U. S. Const., art. 1, sec. 17). It may, therefore, create, empower, limit, and remove. In creating the supreme court of the District of Columbia it was provided that it "shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the circuit court of the District of Columbia, and the justices of the court so to be organized shall severally possess the powers and exercise jurisdiction now possessed and exercised by the judges of said circuit court" (act of March 3, 1863, 12 U. S. St., 762, ch. 91). The circuit court of the District of Columbia and the judges thereof prior thereto had been invested with "all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States" (2 U. S. St., ch. 15, sec. 3, p. 105); and by the judiciary act of 1801, Feb. 13, it was provided "that the circuit courts shall have and hereby are invested with all the powers heretofore granted by law

to the circuit courts of the United States, unless where otherwise provided by this act." (2 U. S. St., ch. 4, sec. 10.)

By the judiciary act passed September 24, 1789, it was provided that "the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of another State" (1 U. S. St., ch. 20, sec. 11, p. 78). This provision was re-enacted in the revision of 1873 (U. S. R. S.,
199 sec. 629). In 1871 it was provided that "the Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States" (16 U. S. St., ch. 62, sec. 34, p. 426; sec. 93, R. S. of Dist. of Col.). By section 760 of the Revised Statutes of the District of Columbia it is provided that "the supreme court shall possess the same powers and exercise the same jurisdiction as the circuit courts of the United States."

It is thus apparent that the supreme court of the District of Columbia and the circuit courts of the United States are placed upon the same footing and invested with the same jurisdiction and powers, except as to the residence of parties. They are each given jurisdiction of suits of a civil nature at common law or in equity. Neither have common-law jurisdiction except that conferred by statute, and consequently each is controlled by subsequent legislation.

In 1801 the laws of Maryland were continued in force over that portion of the District ceded to the Government by that State, but this statute only remained in force in so far as it was not inconsistent with other statutes or modified or repealed. (R. S. of Dist. of Col., sec. 92; 2 U. S. St., ch. 15, sec. 1, p. 104.)

Does section 725 of the Revised Statutes apply to the District of Columbia? Our attention has been called to no rule of the supreme court of the District of Columbia or statute that is in
200 conflict with its provisions. It is not locally inapplicable, and under section 93 of the statute above referred to we see no reason why it is not given the same force and effect within the District that it has elsewhere within the United States. It may be that other sections of the same chapter may not apply to the District of Columbia, but it is because they are either locally inapplicable or there are local rules or statutes covering the same subject-matter. (See Hovey *v.* McDonald, 109 U. S. R., 150, construing section 1007 of the U. S. R. S.) We consequently are of the opinion that section 725 of the Revised Statutes of the United States is in force in the District of Columbia, and, as construed by the United States courts, it restricts the supreme court of the District in its punishment for contempt to either a fine or imprisonment.

Was the decree entered in that action void or was it merely voidable, and are the defendants in this action bound thereby? In 12 Am. & Eng. Ency. of Law, at page 1470, under the head of

judgments, it is said that "it is an axiom of the law that judgments entered without any jurisdiction are void, and will be so held in a collateral proceeding, and there is a strong and growing tendency in all the courts to hold that although a court had jurisdiction over both the person and the subject-matter, but did not have jurisdiction to enter the particular judgment entered in the case, such judgment is void and may be collaterally impeached." (See note 3 thereunder, and note 1 on page 247.)

201 In McVeigh *v.* The U. S. (11 Wall., 259–267), a libel for information was filed in the district court for the district of Virginia for the forfeiture of certain real and personal property of one William McVeigh. The libel alleged that he held an office under the Confederate government, and that he had taken the oath of allegiance to support the constitution of that government. He appeared by counsel, made a claim to the property, and filed an answer. The attorney for the United States moved that the claim, answer, and appearance be stricken from the files upon the ground that he was at the time a resident of the city of Richmond, within the Confederate lines, and a rebel. The motion was granted, and subsequently his default was taken and a decree rendered *pro confesso* for the condemnation and sale of his property. The judgment was reversed in the Supreme Court. Justice Swayne, in delivering the opinion, says: "In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confirmed to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

202 In Windsor *v.* McVeigh (93 U. S. R., 274) the same question was again brought before the court under an action of ejectment to recover certain real property which had been acquired under the decree mentioned in the former case. Justice Field in delivering the opinion of the court says: "The doctrine invoked by counsel that where a court has once acquired jurisdiction it has the right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of action, such as civil or criminal, or to particular modes of administering relief, such as legal or equitable. * * * Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things and

cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or for personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property,
203 the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases."

In *Ex parte* Lang (18 Wall., 163–176) the prisoner had been convicted of the crime of stealing mail-bags. He was sentenced to one year's imprisonment and to pay a fine of $200, and was on the same day committed to jail in execution of his sentence. On the following day he paid the fine. The statute authorized imprisonment or fine; it did not authorize both. On the next day the prisoner was brought before the court, and an order was entered vacating the former judgment, and the prisoner was again sentenced to one year's imprisonment. Mr. Justice Miller, in delivering the opinion of the Supreme Court, says in reference thereto: "We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. * * * It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with a party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Be-
204 cause he had no power to render such a judgment. So, if a court of general jurisdiction should on an indictment for libel render a judgment of death or confiscation of property, it would, for the same reason, be void; or if on an indictment for treason the court should render a judgment of attaint whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court and forbid by the Constitution." (*Ex parte* Fiske, 113 U. S. R., 713–718; *In re* Bonner, 151 *id.*, 242; *In re* Mills, 135 *id.*, 263–270; *Ex parte* Terry, 128 *id.*, 289–304; *Ex parte* Reed, 100 *id.*, 13–23; *In re* Frederich, 149 *id.*, 70–76; Bigelow *v.* Forrest, 9 Wall., 339. See also note entitled "Want of authority under jurisdiction conferred," in Morrill *v.* Morrill, 11 L. R. A., 157.)

We have examined, but do not here refer to, the cases in which irregularities only appear in the judgment entered, in which it has

been held that they are voidable only and cannot be attacked collaterally. The question presented may be close and upon the border, but we are inclined to the view that as to Riggs & Co. the judgment is void; that after the answer had been interposed by the defendants the court had no power to order judgment without a trial of the issues presented. In the language of Justice Field, above referred to, the court, although having jurisdiction of the case and of the parties, "is still limited in its modes of procedure and in the extent and character of its judgments."

Assuming that the members of the firm of Riggs & Co. purchased the bonds with notice of the pendency of the action, and that they took the same subject to the determination
205 therein to be made, they had the right to have the question at issue determined upon the merits. McDonald and White were, as to them, assignors for value, and they had no power, by acts or declarations thereafter done or made, to impeach the title so transferred to Riggs & Co. McDonald and White could not, by fraud or collusion with the plaintiffs, impair their title or by a confession of judgment deprive them of their rights to the bonds. Riggs & Co. were not parties to that action, and it does not appear that they ever had notice of the proceedings in contempt. As purchasers *pendente lite* Riggs & Co. took the risk of the litigation then pending, but in so doing did not assume the risk of any punishment that might be inflicted upon McDonald and White in an independent proceeding. (Connor *v.* Reeves, 103 N. Y., 527–532; Ferguson *v.* Crawford, 70 *id.*, 253.)

It is contended that the decree striking out the defendants' answer was not based upon the proceedings in contempt; but the proceedings, orders, and decree do not support this contention. If the answer was not stricken out as a punishment, for the contempt of which the defendants had been convicted, then by what authority were the defendants deprived of their right to a trial and a determination of the issues involved? Again, it is said that section 725 of the Revised Statutes has reference to criminal and not civil contempts, but no such distinction is found in the statutes or is made by the authorities construing the same.

The judgment appealed from should be affirmed with costs.

All concur. Judgment affirmed.

205½ [Endorsed:] New York court of appeals. Charles E. Hovey, etc., *vs.* George Elliott, etc. Opinion.

206 The Supreme Court of the United States.

CHARLES E. HOVEY, Survivor of William P. Dole, Plaintiff in Error,
against
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors, etc., of John Elliott, Deceased, Defendants in Error.

Assignment of Errors.

Afterwards, to wit, on the second Monday in April, in the year of our Lord one thousand eight hundred and ninety-five, at the October term for eighteen hundred and ninety-four of the Supreme Court of the United States, in the city of Washington and District of Columbia, comes the said Charles E. Hovey and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I. That the court of appeals of the State of New York failed to give full faith and credit to the decree of the supreme court of the District of Columbia set forth in the complaint herein or to give to said decree the same faith and credit as it has by law and usage in the courts of the District of Columbia.

II. That the court erred in holding that the supreme court of the District of Columbia had no power or jurisdiction to render the decree set forth in the complaint.

207 III. That the court erred in holding that section 725 of the United States Revised Statutes applied to the supreme court of the District of Columbia, and that by reason of said section the said court had no power to make the order in the suit of Hovey and Dole, complainants, against McDonald and White, defendants, directing that the answer of said defendants be removed from the files.

IV. That the court erred in holding that the said order and decree of the supreme court of the District of Columbia were rendered as a punishment of the defendants, McDonald and White.

V. That the court erred in holding that the said decree was not enforceable in the courts of the State of New York against the defendants in this action.

And there is also error in this, to wit, that by the record and proceedings aforesaid it appears that the judgment aforesaid was given in favor of the defendants, George Elliott and George L. Elliott, as executors, etc., of John Elliott, deceased, and against the plaintiff, Charles E. Hovey, survivor of William P. Dole, dismissing the complaint of said Charles E. Hovey, whereas, by law of the land and by the Constitution and statutes of the United States, the said judgment ought to have been given to the said Charles E. Hovey and against the said George Elliott and George L. Elliott for the amount demanded in the complaint and in accordance with the terms of the said decree of the supreme court of the District of Columbia.

208 And the said Charles Hovey prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, and that in place thereof judgment may be directed and rendered for the plaintiff in error for the sum demanded in the complaint.

EVERETT P. WHEELER,
Attorney for Plaintiff in Error, 45 William Street, New York City.

209 [Endorsed:] Court of appeals. Charles E. Hovey, etc., *vs.* George Elliott, etc. Assignment of errors.

210 Supreme Court of the United States, October Term, 1894.

CHARLES E. HOVEY, as Survivor of William P. Dole, Plaintiff in Error,
vs.
GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors, &c., of John Elliott, Deceased.
} Case No. 15860.

Stipulation of Counsel.

A certain printed volume, containing 1,492 pages, marked "Defendants' Exhibit No. 1," mentioned in the first finding of fact made by the referee below, at the request of the defendants below, and constituting part of the record of this cause, having been transmitted to this court by the clerk of the court of appeals of the State of New York without authentication or identification, it is now, this 21st day of May, 1895, stipulated and agreed by and between the parties to this cause, through the undersigned, their counsel of record therein, that the said printed volume so marked and mentioned shall be held, deemed, and taken, notwithstanding such want of authentication and identification, as part and parcel in all respects of the record in this cause.

FREDERICK S. DUNCAN &
EVERETT P. WHEELER,
Counsel for the Plaintiff in Error.
JOHN SELDEN,
Counsel for the Defendants in Error.

211 [Endorsed:] Case No. 15,860. Supreme Court U. S., October term, 1896. Term No., 255. Chas. E. Hovey, &c., P. E., *vs.* George Elliott & Geo. L. Elliott, as ex'rs, &c. Stipulation to make "Defendants' Exhibit No. 1" part of record. Filed May 24, 1895.

Endorsed on cover: Case No. 15,860. New York court of appeals. Term No., 255. Charles E. Hovey, as survivor of William P. Dole, plaintiff in error, *vs.* George Elliott and George L. Elliott, as executors, &c., of John Elliott, deceased. Filed April 5th, 1895.

FILED
MAR 26 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

255

CHARLES E. HOVEY, as survivor of WILLIAM P. DOLE,

Plaintiff in Error,

vs.

GEORGE E. ELLIOTT AND GEORGE L. ELLIOTT, as Executors, etc., of JOHN ELLIOTT, deceased,

Defendants in Error.

Brief for Plaintiff in Error.

EVERETT P. WHEELER,
Counsel for Plaintiff in Error.

B. H. TYRRELL, Printer, 74 Maiden Lane, N. Y.

Supreme Court of the United States

CHARLES E. HOVEY, survivor of WILLIAM P. DOLE,
Plaintiff in error,

against

GEORGE ELLIOTT and another, as Executors of JOHN ELLIOTT, deceased,
Defendants in error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error, sued out to review a judgment of the Court of Appeals of the State of New York which affirmed a judgment of the General Term of the New York Superior Court. This affirmed a judgment entered upon the report of a Referee, dismissing the complaint on the merits with costs. An appeal had been taken to the Court of Appeals from a previous judgment of dismissal.

The first judgment was reversed, and a new trial ordered; 118 N. Y., 124. The second appeal is reported 145 N. Y., 126.

The case came before the Court of Appeals upon the report of a Referee (pp. 59–71); certain findings made by him in addition to the report (pp. 71–94); and exceptions filed by plaintiffs to some of the findings and refusals to find (pp. 94–97). Plaintiffs did not make a case containing the evidence, but appealed upon the record.

The action was brought to enforce a lien arising by virtue of a judgment of the Supreme Court of the District of Columbia, upon certain bonds of the District of Columbia, and the proceeds thereof. These bonds were bought by the defendants during the pendency of a suit in the Supreme Court of that district, in which the surviving plaintiff, Hovey, and William P. Dole (who has died during the pendency of this suit, p. 128) were plaintiffs, and Augustine R. McDonald and William White were defendants. In that suit the plaintiffs claimed a lien under an agreement between themselves and McDonald, by which the plaintiffs were "to aid in such manner as may by them be deemed best" for the interest of McDonald, in the prosecution before the mixed commission on British and American claims of a claim of McDonald against the United States, for the value of certain cotton. McDonald was to pay the plaintiff a sum equal to twenty-five per cent. "of the amount which may be allowed on said claim, the payment of which sum is hereby made a lien upon the said claim, and any draft, money or evidence of indebtedness which may be paid or issued thereon" (Ex. H., p. 18). After this agreement McDonald made an assignment to White, which the decree in the Dis-

trict of Columbia adjudges fraudulent (p. 75). An award of $197,190 in gold was made to McDonald by the commission, and the action in the District of Columbia was brought to enforce the lien upon this sum, and the draft or warrant issued in payment of it (pp. 59, 71).

Another action was brought by one Thomas J. Phelps, assignee of McDonald, to enforce an alleged claim in his favor upon the same award. In this suit and in the Hovey suit, an order was made by consent February 16, 1875, that White might receive from the agent of the British Government one-half the award, and that the remaining half be paid to George W. Riggs, and that "he should hold the said half of the said award subject to the claims, liens and rights of the said Charles E. Hovey and William P. Dole, and of the plaintiff in this cause (Phelps) to be determined by the further decree of this Court and in the case of Hovey and Dole hereinbefore mentioned" (p. 72).

The Receiver was ordered to invest in bonds the gold to be received by him for half the award (p. 72). He converted the gold into currency and invested the proceeds in bonds of the District of Columbia, of the par value of $152,300 (p. 73).

George W. Riggs was a member of the firm of Riggs & Company, of which the original defendants in this suit, including John Elliott, were the surviving partners. After he had made the investment before mentioned, the Supreme Court of the District of Columbia, at Special Term, rendered a decree June 24, 1875, sustaining a demurrer and dismissing the bill. On the same day Hovey and Dole appealed from this decree to the General Term of the Supreme Court of the District of Columbia (p. 73).

June 28, 1875, this decree was amended by adding a direction to the Receiver to deliver the bonds to the defendants. On the same day the Receiver appeared before one of the Judges of the Supreme Court of the District, with the counsel for the defendant McDonald, and for the plaintiff Phelps, and verbally asked the said Judge as to the Receiver's duty in the premises. No counsel for Hovey or Dole was present at this hearing, and no notice was given of it to them. No written papers of any sort were submitted to the Court, and the Judge verbally directed the Receiver to obey the said decree (p. 85). Thereupon the Receiver endorsed the bonds in blank and delivered them into McDonald's possession (p. 86). He took a receipt from McDonald and White for $108,132.68, "in full of the fund held as Receiver" (p. 86). On the same day McDonald sold and delivered the bonds to Riggs & Company, who afterwards sold them (p. 88).

The decree was reversed on appeal by the General Term of Supreme Court of the District. The cause was remanded. The defendants answered and testimony was taken. Thereupon a motion was made that the defendants be required to deposit in the Registry of the Court the sum of $49,297.50 in gold, which had been paid to defendants by the Receiver, and which was one-quarter of McDonald's award, and the share of it to which Hovey and Dole would become entitled if their lien should be adjudged valid. The order asked for was granted (pp. 51, 52). The order was served personally on White and was served on McDonald by leaving the same at his residence, he having left the city of Washington. The defendants did not obey the order (p. 53), and an order to show

cause why they should not be punished for this disobedience was obtained by the counsel for complainants (p. 53). Of the hearing on this order to show cause the counsel for defendants had notice (p. 54). The Court thereupon adjudged that McDonald and White be taken and deemed to be in contempt of the aforesaid order of the Court (p. 54).

It was further adjudged that unless within six days from the entry of the order and service of a copy thereof upon their solicitors, they should comply with the previous order and pay into Court the sum of $49,297.50 in gold, their answer be stricken out, and that the cause proceed as if no answer therein had been interposed (p. 54).

Subsequently complainants moved that the answer be taken from the files of the Court (p. 54). Notice of this motion was served on solicitors for the defendants (p. 55). Thereupon the Court ordered that the answer be "stricken out and removed from the files of the Court, and that this cause do proceed as if no answer herein had been interposed" (p. 56).

Thereupon (February 12. 1878), an order was made that the bill be taken *pro confesso* (p. 56). Thereafter a final decree was entered in the Supreme Court of the District that the defendants McDonald and White "pay to the complainants the sum of $49,297.50," in gold, and "that complainants have a lien upon the claim of Augustine R. McDonald against the United States, as awarded by the mixed commission of British and American claims under the treaty of May 8, 1871, of $197,190 in gold, and upon any draft, money, evidence of indebtedness, or proceeds thereof, with legal inter-

est from this date" (pp. 74, 75). This decree was entered April 17, 1878 (p. 74). It thus appears that McDonald and White had been allowed ten months (from June 15, 1877, to April 17, 1878) to restore to the registry of the Court the money which they had obtained from its Receiver.

The plaintiffs were advised that their remedy was against the Receiver, and took proceedings in the Supreme Court of the District to compel him to account. His account showed the investment which he had made of the money, and the delivery of the bonds to the defendants in the suit. The Supreme Court of the District overruled the exceptions taken by the plaintiffs to this account. The plaintiffs appealed from this judgment to this Court. This Court refused to dismiss the appeal, heard it upon its merits, and affirmed the judgment in favor of the Receiver (pp. 76, 81, 82).

Hovey *vs.* McDonald, 109 U. S., 150.

It appears from the report that the case was decided in favor of the appellees November 5, 1883. Thereupon the plaintiffs were advised that their remedy was against the firm of Riggs & Co., who had bought these bonds with notice of the claim against them, and the present action was brought in the New York Superior Court April 16, 1884.

The answer originally interposed by the defendants did not set up the defense of want of jurisdiction (pp. 111–115).

It was apparently not till after the Court of Appeals had overruled the defense under the Statute of Limitations that the jurisdiction of the Supreme Court of the District was assailed in the second amended answer (pp. 12–14).

This was sworn to June 25, 1890 (p. 15). The

decision of the Court of Appeals on the first appeal was rendered January 14, 1890 (118 N. Y., 125).

This new defense was, however, sustained by the Referee, who held that the Supreme Court of the District of Columbia had no power to strike out the defendants' answer, that the decree was based upon the order striking out this answer, and that the decree was, therefore, void for want of jurisdiction.

There was no disputed question of fact. It is the peculiar practice adopted by defendants which has swollen the record to its present bulk. They procured the finding of a volume of 1492 pages, containing all the subpœnas, bills of costs, notices to take testimony, and countless other formal proceedings in the District of Columbia (p. 81). This is the bulky volume, handed up with the record. Every material page of it is contained in the appeal book. It is an irrelevant exhibit.

The testimony in the former case is irrelevant in this.

Ferris *vs.* Fisher, 67 Hun (N. Y.), 134.

Assignment of Errors.

I.—That the Court of Appeals of the State of New York failed to give full faith and credit to the decree of the Supreme Court of the District of Columbia set forth in the complaint herein, or to give to said decree the same faith and credit as it has by law and usage in the Courts of the District of Columbia.

II.—That the Court erred in holding that the Supreme Court of the District of Columbia had no

power or jurisdiction to render the decree set forth in the complaint.

III.—That the Court erred in holding that Section 725 of the United States Revised Statutes applied to the Supreme Court of the District of Columbia, and that by reason of said section the said Court had no power to make the order in the suit of Hovey and Dole, complainants, against McDonald and White, defendants, directing that the answer of said defendants be removed from the files.

IV.—That the Court erred in holding that the said order and decree of the Supreme Court of the District of Columbia were rendered as a punishment of the defendants, McDonald and White.

V.—That the Court erred in holding that the said decree was not enforceable in the Courts of the State of New York against the defendants in this action.

VI.—Judgment should have been rendered in favor of the plaintiff and against the defendants for the amount demanded in the complaint, and in accordance with the terms of the said decree of the Supreme Court of the District of Columbia.

POINTS.

SUMMARY.

The decision of the Court of Appeals refused to this decree of the Supreme Court of the District of Columbia such faith and credit as it has by law

and usage in the Courts of the District. This faith and credit it receives there as a general principle of equity jurisprudence. This refusal presents a federal question for review in this Court.

Embry *vs.* Palmer, 107 U. S., 3.

We claim that this judgment, upon the facts found by the Referee, entitles the plaintiff to judgment against the defendants for the amount of such judgment with interest and costs, and that in fact there is no question upon the record but a federal question. In other words we claim:

1. That the decree is not assailable collaterally for any cause appearing on the record.

2. That it was a valid decree and within the jurisdiction of the Supreme Court of the District.

3. That as such it is just as binding upon the defendants, who were purchasers *pendente lite*, as if they had been parties to the original record.

4. That its effect was to create a new cause of action and that therefore the plea of the Statute of Limitations to the original cause of action was irrelevant.

First.

When Decree is Assailable Collaterally.

The Court of Appeals say (145 N. Y., 143, Record, p. 138): "The question presented may be close and upon the border, but we are inclined to the view that as to Riggs & Co. the judgment is void; that after the answer had been interposed by the

defendants the Court had no power to order judg ment without a trial of the issues presented."

The decision would have been more accurately expressed, if it had been thus stated :

That after the answer had been interposed by the defendants the Court had no power to strike it out, and that the judgment rendered after it was stricken out was therefore without jurisdiction and void.

For it is not claimed, that any of the proceedings in the Supreme Court of the District were void except those which led to the striking out of the answer and the order striking it out. The final decree was one which that Court in the orderly conduct of equity proceedings clearly had power to render upon a bill which had regularly been taken *pro confesso*. The decision on the question of jurisdiction can therefore only be sustained by holding that the effect of a void order that a bill be taken *pro confesso*, is to make void a decree, in an equity cause, rendered by a Court having jurisdiction of the person and having full equity powers.

We submit that this proposition cannot be maintained, either on principle or authority.

The cases in which it has been held that a decree can be assailed collaterally for want of jurisdiction are many and complicated. They may be conveniently divided into four classes :

1. Where the Court has no jurisdiction of the subject matter of the case, as for example, the State Courts of an admiralty proceeding,

The Josephine, 39 N. Y., 19.

or of an action to enforce a patent ;

Dudley *vs.* Mayhew, 3 N. Y., 9.

2. Where no notice or hearing is allowed the defendant.

(*a*) Where it never acquired jurisdiction of his person, as in divorce cases.

Scott *vs.* McNeill, 154 U. S., 34.
Pennoyer *vs.* Neff, 95 U. S., 714.
Reed *vs.* Chilson, 142 N. Y., 152.

(*b*) Where a hearing was denied the defendant.

McVeigh *vs.* The United States, 11 Wall, 259.
Windsor *vs.* McVeigh, 93 U. S., 274.

3. Where the judgment "is entirely aside of the issue raised in the record."

Reynolds *vs.* Stockton, 140 U. S., 254, 266.
Munday *vs.* Vail, 34 N. J. Law, 418.

4. In a court of special and limited jurisdiction the total absence of evidence as to any fact essential to the jurisdiction.

Scott *vs.* McNeill, 154 U. S., 34.
Hewitt *vs.* Newburger, 141 N. Y., 538.

Of this class of cases the proceedings in a court of probate in the matter of the estate of a person supposed to be dead, are an illustration.

Springer *vs.* Shavender, 33 L. R. Ann., 772, note.

Second.

Decree in Hovey vs. McDonald not assailable collaterally.

The case at bar does not come under any of these classes. The suit in the Supreme Court of the District of Columbia was an equity suit, of which that Court had jurisdiction (Second Finding, p. 59).

It acquired jurisdiction of the persons of the defendants, and they actually appeared in the suit, demurred to the bill, were heard on such demurrer, and then filed an answer (pp. 61, 62).

The Court had unquestionably power to render judgment declaring the plaintiffs' lien and adjudging that the defendants make it good. This is entirely responsive to the case made by the bill, and in accordance with its prayer (p. 31).

No case can be cited where under such circumstances the final judgment was held to be without jurisdiction.

1. In other words, wherever jurisdiction of the person of the defendant has been acquired by service of process, and the Court has jurisdiction of the subject matter, where the judgment is such as the Court has power to render, and an opportunity for a hearing is given the defendant, no intermediate errors can oust the jurisdiction. The only remedy is by appeal.

In Laing *vs.* Rigney, 160 U. S., 531, this Court, reversing the New York Court of Appeals, held that a decree of the New Jersey Court of Chancery, could not be assailed collaterally because the Chancellor, having once obtained jurisdiction of the person of the defendant, allowed a supplemental

bill to be filed, containing a new cause of action, and rendered a decree upon this cause of action without issuing any process, or service of the supplemental bill upon the defendant within the State. Certainly in this case there was just as much lack of hearing the defendant as in the present case—in fact more so, for in the present case notice of the proceedings was served upon the defendants' solicitors, while nothing of the sort was done in the New Jersey suit.

This Court quoting with approval the case of Nash (or Cornett) *vs.* Williams, 20 Wall., 226, 249, say (p. 542):

"The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. * * * In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensure if the rule were otherwise."

S. P. Loyd *vs.* Walker, 20 C. C. A., 548; 74 F. R., 601.

In this case the Texas statute required an order extending the term of administration after the expiration of twelve months from the date of the order by which it was granted. No such order appeared, yet it was held that an order subsequently made by the Probate Court for the appointment of an administrator *de bonis non*, could not be collaterally attacked.

Comstock *vs.* Crawford, 3 Wall., 396. At p. 404, the Court say:

"When by the presentation of a case within the

Statute, the jurisdiction of the Court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the Court can be collaterally assailed."

To the same effect are:

Simmons *vs.* Saul, 138 U. S., 439, 452.
Noble *vs.* Union River Logging R. R., 147 U. S., 165, 174.
Thaw *vs.* Ritchie, 136 U. S., 519, 548.
Grignon's Lessee *vs.* Astor, 2 How., 319.
Manley *vs.* Mickle, 53 N. J. Eq., 155, aff'g S. C., 52 *Ibid*, 712.

A comparison of this case and Reynolds *vs.* Stockton, 140 U. S., 254, is instructive. Both were originally decided by the Court of Errors of New Jersey. In the former the judgment was according to the prayer of the bill, but not warranted in law by the allegations. Nevertheless it was held conclusive. In the latter the judgment was not according to the prayer of the complaint, and disposed of matters not within the issue. It was held void.

In the case at bar the judgment was given as prayed for.

2. In Windsor *vs.* McVeigh, so much relied on by the Court below, 93 U. S., 282, this Court admit the correctness of the rule stated in the first subdivision. The decision is put on the ground that "the appearance was stricken out" (p. 283).

At p. 282 the Court say:

"The legal effect of striking out his appearance

was to recall the monition and notice as to him. His position, with reference to subsequent proceedings, was then not unlike that of a party in a personal action, after the service made upon him has been set aside. A service set aside is never service by which a judgment in the action can be upheld."

In Hovey *vs.* McDonald, the appearance was not stricken out. On the contrary, defendants left the jurisdiction and refused to obey the order of the Court. If Windsor had done this and his appearance had not been stricken out, is it not plain that the decision in the McVeigh case would have been the reverse of what it was?

There is, however, a passage in the opinion of the Court in that case very pertinent to this. At p. 283 the Court say:

"The decree of a Court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is that the Courts are not authorized to exert their power in that way."

Yet counsel seems to think that just such a proceeding can shield George W. Riggs, or his firm, from the consequences of their purchase of these bonds with notice of plaintiff's lien.

3. The rights of defendant are not ignored when a bill is taken *pro confesso*. Complainant is not entitled to any relief he chooses to ask, defendant can still be heard, and may appeal from the decree.

Thomson *vs.* Wooster, 114 U. S., 104.

In that case this Court say of such a decree (p. 111):

"It cannot be impeached collaterally, but only upon a bill of review or (a bill) to set it aside for fraud."

S. P. Ogilvie *vs.* Herne, 13 Ves., 563.

In this case the master of the rolls (Sir William Grant) says:

"The decree, obtained upon the bill, taken *pro confesso*, is just the same as any other decree of the Court. The consequence is that it cannot be impeached collaterally, but must, like every other decree, be impeached directly, upon a bill of review or a bill to set it aside for fraud. Where is the injustice of not permitting the defendant, against whom such a decree has been made, to proceed collaterally? *It is the effect of his own obstinacy*, not putting in his answer. He desires to do now what, I must take it, he *willfully and obstinately did not do before.*"

4. A case cited by defendants, Fuller *vs.* Claflin, 93 U. S., 14, illustrates the distinction contended for.

In that case an order had been made striking out an amended answer. "A request for time until the next morning to perfect the answer was refused, and judgment entered for the amount of the claim." To review this judgment a writ of error was brought. The Supreme Court held that the Court below had acted inadvisedly in rendering immediate judgment upon such an order, and reversed that judgment. The review by appeal of this judgment, and the failure of counsel even to suggest that the order was beyond the jurisdiction of the Court are significant. The following case in the same volume, *ex parte* Parks, 93 U. S., 18, still further illustrates the distinction. In that case it was held that this Court would not on *habeas cor-*

pus consider whether a matter for which a party is indicted in the United States District Court is, or is not a crime against the laws of the United States. That Court, it held, had jurisdiction to decide the question, and its decision could not be reviewed collaterally.

5. The refusal to comply with the order of the Court, and the remaining out of its jurisdiction, waived any constitutional guaranty. This was expressly held in reference to contempt proceedings in

Eureka Lake Co. *vs.* Superior Court, 111 U. S., 410.

So also, with reference to the constitutional right to be confronted with the witnesses against an alleged criminal.

Reynolds *vs.* United States, 98 U. S., 145.

"A party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection."

Sentenis *vs.* Ladew, 140 N. Y., 463, 466.
Embury *vs.* Conner, 3 N. Y., 511.

6. Service of the several notices upon the attorney for the defendants was regular and sufficient.

Eureka Lake Co. *vs.* Superior Court, 111 U. S., 410.
Walker *vs.* Walker, 82 N. Y., 260, aff'g S. C., 20 Hun, 400.
Pitt *vs.* Davison, 37 N. Y., 235.

Third.

Decree in Hovey vs. McDonald conclusive, even if erroneous or irregular.

I.—The defendants thought it necessary that the rules of the Supreme Court of the District and of this Court should be found as facts (pp. 64-66, 90, 91). This illustrates the fallacy of their position. Do they argue that the decree of that Court was in violation of these rules? That might show that it might be reversed on appeal. But, however irregular or erroneous a judgment may be, it is not open to collateral attack, if the Court have jurisdiction of the person and of the cause, and power to render that kind of a judgment. Defendants' sole remedy was by appeal.

Dowell *vs.* Applegate, 152 U. S., 327.
Grignon's Lessee *vs.* Astor, 2 Howard, 319, 340.
Re Chapman, 156 U. S., 211.
Herron *vs.* Dater, 120 U. S., 464.
Wineman *vs.* Gastrell, 53 Fed. Rep., 697, 703; S. C., 3 C. C. A., 621.
Bigelow *vs.* Chatterton, 51 Fed. Rep., 614, 620; S. C., 2 C. C. A., 402.
Hendrick *vs.* Whittemore, 105 Mass., 23.
Oceanic Co. *vs.* Compania Espanola, 134 N. Y., 46.
Rocco *vs.* Hackett, 2 Bosw., 579.
Haskell Co. Bank *vs.* Bank of Santa Fe (Kansas), 32 Pac., 627.
City of Paterson *vs.* Baker (N. J.), 26, Atl. R., 324.

First National Bank *vs.* Geneseo, 32, Pacific (Kansas), 902.
State *vs.* Morris, 2 N. Eastern Rep. (Ind.), 355.
Board of Guardians *vs.* Shuter, 34 N. Eastern Rep. (Ind.), 665.

In the latter case it was claimed that the statute under which the Court took jurisdiction of the original cause was unconstitutional. The Supreme Court of Indiana held that as the Court whose judgment was drawn in question had general jurisdiction to render the judgment, the fact that this was rendered in pursuance of an unconstitutional statute was irrelevant.

II.—It is immaterial whether the judgment was by default or confession. It is final and no more open to collateral attack than one rendered after a trial upon the merits.

Thomson *vs.* Wooster, 114 U. S., 104.
White *vs.* Crow, 110 U. S., 183.
Ogilvie *vs.* Herne, 13 Ves., 563.
Gates *vs.* Preston, 41 N. Y., 113.
Nemetty *vs.* Naylor, 100 N. Y., 562.
Kinnier *vs.* Kinnier, 45 N. Y., 535.
Ferris *vs.* Fisher, 67 Hun, 135.
Austin *vs.* Austin, 43 Ill. App., 488.
Gibbs *vs.* Southern (Mo.), 22 S. W. Rep., 713.
Tracy *vs.* Shumate, 22 W. Va., 475.

III.—The judgment appealed from is based on an erroneous interpretation of the word "*jurisdiction.*" That is sometimes used to mean power to render a particular judgment. Again it is used

with reference to the regular method of obtaining particular relief.

In the first sense only, the word is used when it is said that a particular judgment is void for want of jurisdiction, and is therefore open to collateral attack.

For example, at common law some Courts had no jurisdiction of real actions. If a Court which had no jurisdiction of an action for the recovery of real estate should render a judgment for its recovery, this might be void. So the State Courts have no jurisdiction of Admiralty cases or patent cases.

On the other hand, a Court of equity is said not to have jurisdiction when the common law is adequate to give relief. Nevertheless it is well settled that if this objection is not taken at the hearing, it is waived, and cannot be taken for the first time, even on appeal, much less collaterally. In such a case the Appellate Court, in its discretion and for its own protection, may *on appeal* take the objection, but the parties cannot,

Reynes *vs.* Dumont, 130 U. S., 354
Brown *vs.* Lake Superior Iron Co., 134 U. S., 530.
Town of Mentz *vs.* Cook, 108 N. Y., 504, 508.
1 Daniel, Ch. Pr., 555 (4 Am. Ed.).

Yet in this case the prohibition of the United States Revised Statutes is more absolute against the jurisdiction than the section relating to contempts.

"Suits in equity shall not be sustained in either of the Courts of the United States where a plain, adequate and complete remedy may be had at law."

U. S. Rev. Stat., § 723.

In like manner it is often said that the Courts of one State have not jurisdiction of an action to recover damages for trespass to lands in another State. If, however, such a suit is brought, and the objection is not taken before judgment the judgment is valid, and will not be reversed even on appeal, much less collaterally.

Sentenis *vs.* Ladew, 140 N. Y., 463.

In like manner, the jurisdiction of the Circuit Courts of the United States in many cases depends upon the citizenship of the parties. If this does not appear affirmatively on the record a judgment will be reversed on appeal.

Coal Co *vs.* Blatchford, 11 Wall., 172.

But this objection for want of jurisdiction cannot be taken collaterally.

Kent *vs.* Lake Superior Co. 144 U. S., 75.

Whyte *vs.* Whyte, 20 How., 541.

Dowell *vs.* Applegate, 152 U. S., 327, 337.

Des Moines Co. *vs.* Iowa Homestead Co., 123 U. S., 552, 557.

A like rule was applied by the New York Court of Appeals to a decree for divorce. Domicile was jurisdictional. The Court of Illinois adjudged that domicile there was proved. This was held conclusive in New York.

Kinnier *vs.* Kinnier, 45 N. Y., 535.

In the case at bar the Court had jurisdiction of the parties and to render the judgment complained of, even if it did not have power to strike out the

answer. Its judgment, therefore, cannot be impeached collaterally.

In Blaine *vs.* The Charles Carter, 4 Cra., 328, an execution issued on a judgment less than ten days after it was rendered. This was expressly prohibited by Sec. 23 of the Judiciary Act (1 U. S. Stat., 85). "Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas."

Yet this Court held that the execution was not void, but voidable only, and that the validity of a sale under it could not be attacked collaterally. This was approved by this Court in

Voorhees *vs.* Bank United States, 10 Pet. 449, 477.

Fourth.

Effect of the Fifth Amendment to the Constitution of the United States.

This amendment provides that no person shall be deprived of his "property without due process of law." This means process adapted to the character of the case. It does not mean that the practice in common law cases shall be the constitutional right of a defendant who is sued in a Court of admiralty or of equity. A defendant, against whom a bill in equity is filed in the Circuit Court of the United States, might as well claim that he is entitled as matter of right to a jury trial, as these defendants claim that they were entitled as matter of right to a hearing on all the evidence, after

McDonald and White had refused to restore to the registry of the Court the money they had taken from its Receiver. They had ten months' time to comply with the order of the Court for the deposit of the money, and over three months to apply to have the answer reinstated. This was due process of law. Since the English Court of Chancery began to exercise its powers there never was a time when a defendant in such circumstances had the right to be heard upon the merits of his alleged defense. This was distinctly held by the New York Court of Appeals, in

Walker *vs.* Walker, 82 N. Y., 260; aff'g S. C., 20 Hun, 400.
See also cases cited under Seventh Point, especially.
Quigley *vs.* Quigley, 45 Hun, 23.
Wartman *vs.* Wartman, Taney Dec., 362, 368.

A similar power is sometimes exercised by Courts of equity in staying a defendant's proceedings. Of this power the General Term of the New York Supreme Court say in

Stubbs *vs.* Ripley, 39 Hun, 626, 630;

"The order further directed that until the fine should be paid, all proceedings on the part of defendant Ripley should be stayed, and that the Court was fully authorized to direct as one of the legal disabilities created by the contempt."

II.—The case chiefly relied upon by defendants in error is Windsor *vs.* McVeigh, 93 U. S., 283.

This case was exceptional. The judgment complained of was rendered during the bitterness of civil war. The defendant was refused a hearing

altogether, and judgment condemning his property, on the ground that he was an alien enemy, was rendered without giving him an opportunity to show the contrary. Such a decree and the decision upon it afford the most absolute contrast to the facts in the present case. As has been shown, McDonald had ample opportunity to protect his rights. Ten months' time was allowed him. Repeated notice was given to his solicitors. After such notice he was proved to be a willful despiser of the authority of the Court. To say that such a man has the same right as an ordinary suitor is to say that a convicted criminal has the same right to liberty as an honest man. The Court of Appeals thus state the rule on this subject:

Walker *vs.* Walker, 82 N. Y., 264.

"It is always within the power of the defendant in a case like this in hand, to apply to the Court and show that the order was irregularly made, or for leave to purge himself of the contempt, and be let in again to make his defence."

S. P. Brinkley *vs.* Brinkley, 47 N. Y., 41.

This is especially clear in the present case, because defendants had two actual hearings in the Supreme Court of the District upon the case made by the bill. Their demurrer was sustained at Special Term. On appeal, this decision was reversed at General Term. This appeal was argued by counsel (p. 33). Leave to answer was given. Can it be said that if no leave to answer had been given but the Court had then made a decree upon the record, this decree would have been void? Clearly not.

The defendants answered, admitting all the material allegations of the bill, and setting up an affirmative defense in the nature of a cross bill, to wit, that the contract on which the action was brought was obtained by fraud (pp. 33–49).

They pray (p. 49) that the contract sued upon may be cancelled, and the complainants enjoined from collecting anything under it.

When parties thus seeking equity refuse to do equity and to restore to the registry of the Court what it has held they have unlawfully taken from it, can it be said that a refusal to allow them to litigate this affirmative defense is such a departure from the rules of equity procedure that it renders void a subsequent decree? Or, in other words, that it is not "due process of law"?

Laing *vs.* Rigney, 160 U. S., 531.

The power of the Court to do this is essential to its existence, and to the proper administration of justice. When a controversy relates to a fund, possession of the fund is of the first importance. Suitors who take the fund away from the control of the Court must be bound to restore it. The whole purpose for which Courts sit is to adjudicate controversies between parties, and if one of these parties, pending the suit, is allowed to take the law into his own hands and carry off the subject matter of the suit this purpose is defeated. The radical objection to the judgment below is that the Courts have sanctioned such a proceeding. It seems impossible that this Court should approve a ruling so subversive of all respect for the authority of Courts or the administration of justice.

III.—Murray *vs.* Hoboken Land & Imp. Co., 18

How. U. S., 277, distinctly held that any process of law which in ordinary course was applicable to the particular class of cases to which it related was "due process of law." For example, the summary proceedings by which a person's property is divested for non-payment of a debt to the government are absolutely different from the proceedings in an ordinary civil action. They were, however, in the case just cited held to be due process of law.

To the same effect is

Ex parte Wall, 107 U. S., 265.

Moreover, "due process of law" never refers to the striking out of pleadings, refusing to hear testimony, or the control by the Court of its proceedings. For example, a motion is made to strike out an answer as sham. This is unquestionably within the power of the Court. The Court might err in striking it out, but no one could claim that a judgment rendered on such an order was collaterally impeachable. Again, it is common in jury trials to exclude testimony. This testimony may be vital. The exclusion may be absolutely erroneous. The defendant may have a clear right to this testimony. But his remedy in all such cases is by exception and appeal, not by impeaching the judgment collaterally.

No right in common law cases is more sacred than that of trial by jury. When a Judge directs a jury to render a verdict, this is no jury trial in any proper sense. The jury have no discretion in the matter, and do not exercise their judgment. It frequently happens that on exception and appeal such directions are overruled, and appellate tribunals grant new trials for an error in this respect.

But no one could contend that a judgment rendered on such a direction was collaterally impeachable on the ground that a constitutional right of a trial by jury was infringed. Defendants in error cited Ensminger *vs.* Powers, 108 U. S., 301. This is a good illustration of the point under consideration. In that case, there was no hearing or decision by the Court. Both were refused, and this, *on appeal*, was held erroneous. But in Hovey *vs.* McDonald there was a hearing. The decision of the Court on this hearing is in its published reports.

Hovey *vs.* McDonald, 3 McArthur, 184.

Counsel for complainants was not allowed to prepare and enter such a decree as he chose. On the contrary, he entered only such a decree as the Court's deliberate judgment allowed him to enter. This decision defendants had the right to review by appeal, and this was their only remedy.

Defendants in error may say that the evidence was ignored, and expatiate on the strength of the evidence adduced by the defendants in Hovey *vs.* McDonald. How do we know that the Court ignored this evidence? It was not stricken from the record, and there is no recital that the Court ignored it. This evidence largely consists of testimony from McDonald. As already shown, the Court had the right to discredit this testimony on the ground of McDonald's misconduct. But suppose the Court did ignore it, and that this is legitimately to be inferred from the evidence, it would be no more than an instruction to the jury to disregard testimony, or the exclusion of testimony on a jury trial. Errors in such

matters are subject to exception and appeal, but not of collateral attack. Respondents argue that due process of law imports compliance with established and lawful methods of procedure. What that means, is that the Court should confine itself to doing what it has power to do. But if a Court should make a mistake and do what is within its power, under circumstances not warranting the exercise of the power, the error in that particular must be reviewed by exception and appeal, and not by collateral attack.

Fifth.

The Power of the Supreme Court of the District of Columbia.

If, however, this Court should overrule the points just argued or should, for any reason, consider the decision of the Court below, that Section 725 of the U. S. Revised Statutes applies to the Supreme Court of the District of Columbia, and that its effect is to absolutely divest that Court of the power to strike out an answer of a defendant because of his disobedience to a previous order of the Court; we submit that this decision is erroneous.

1. This contention is unwarranted by the statutes. The special revision of the laws relating to the District of Columbia treats of the powers of the Courts of the District. It is a separate act from the act adopting the Revised Statutes of the United States. The limits imposed by the latter upon the powers of the Federal Courts do not restrict those of the

Supreme Court of the District. It ought not to need argument to sustain this proposition, for it is a matter of common knowledge that the Circuit Courts of the United States have no jurisdiction of ordinary actions between citizens of the same State. If the powers of the Courts of the District were limited as are those of the Circuit Courts of the United States, there would be no tribunal in the District of Columbia to enforce ordinary rights of action. The present case affords a curious instance of the entire omission by eminent judges to consider an obvious and elementary proposition. For greater caution, however, and as a matter of professional interest, we submit the following history of the Courts of the District, showing how their powers were acquired, and how absolutely they are unrestricted by the limitations of the Judiciary Title of the U. S. Revised Statutes, as has been repeatedly held by this Court. The first case to which we refer is between these same parties.

Hovey *vs.* McDonald, 109 U. S., 150.

This expressly held that Section 1067 of the Revised Statutes did not apply to the Supreme Court of the District of Columbia. This section prohibits the issue of execution until ten days after the entry of judgment. It is part of the same Title (The Judiciary, Title XIII), as the section relating to contempts. It was on this section that Hovey's counsel argued before this Court that Riggs, the Receiver, had no right to deliver the bonds to McDonald until ten days after the entry of judgment. This contention was successfully opposed by the counsel for Riggs. After having convinced this Court that the United States Re-

vised Statutes do *not* apply to the Supreme Court of the District, he now argues that they do. On this subject the previous decision of this Court is controlling.

2. A review of the statutes will show clearly that there is no ground whatever for the contention of defendants in error on this point.

The Act of February 27, 1801, 2 U. S. Stat. at Large, 105, Section 3, created the Circuit Court of the District of Columbia, and provided it "shall have all the powers vested by law in the Circuit Courts and the Judges of the Circuit Courts of the United States." At the time this act was passed, the Act of February 12, 1801, was in force; which created what jurists now recognize to have been the best organization the Federal Courts have ever had and gave the Circuit Courts more extensive powers than were conferred upon them by subsequent statutes. This act was, however, passed at a time of great party excitement, and was repealed soon afterwards. But this Court held in

Kendall *vs.* U. S., 12 Peters, 524,

that the repeal of the Circuit Court act did not affect the powers of the Circuit Court of the District of Columbia, and that the latter retained all the powers which had been given by the prior act to other Circuit Courts. This act was held to be referred to only by way of description. The Kendall case held that the whole judicial power which Congress was capable of vesting, was by the act of February 27, 1801, vested in the Supreme Court of the District. At page 614 the Court say:

"The common law as it was in force in Maryland when the cession was made, remains in force in this District."

At page 619 the Court say:

"There is in this District no division of powers between the general and state governments. Congress has the entire control of the district for every purpose of Government."

At page 623 the Court quote from Section 5 of the act before referred to, and hold that its effect is to give the Circuit Court of the District full jurisdiction "of all cases in law and equity between parties, both or either of which shall be resident or be found within the district." For the reasons thus stated the Court held that the Circuit Court of the District had the common law power to issue a writ of mandamus, which power they had held was not vested in the other Circuit Courts of the United States.

March 3, 1863, the Circuit Court of the District of Columbia was abolished, and it was enacted (12 U. S. Stat. at Large, 762, Section 1): "There shall be established in the District of Columbia a Court to be called the Supreme Court of the District of Columbia, which shall have general jurisdiction in law and in equity." Section 3 provided it "shall possess the same powers and exercise the same jurisdiction as is now possessed by the Circuit Court of the District of Columbia." February 21, 1871, an act was passed by Congress providing for a new government of the District (Vol. 16, Stat. at Large, p. 424). This act made no change, however, in the powers of the Supreme Court of the District. In the Revised Statutes relating to the District of Columbia (p. 9, sec. 89), it was provided: "The judicial Courts of the District remain as organized on the 21st February, 1871, until abolished or changed by Act of Congress." This revision of the laws relating to the District was ap-

proved June 22, 1874. Under this legislation it was held that the Supreme Court of the District had power to issue a writ of mandamus, although the Circuit Courts have no such power.

United States *vs.* Schurz, 102 U. S., 378, 393.

3. To the power in civil cases of the Supreme Court of the District the observation of this Court as to the power of its predecessor in criminal cases, is applicable.

Ex parte Watkins, 3 Peters, 193. At p. 203, the Court say:

"The Circuit Court for the District of Columbia is a Court of record having general jurisdiction over criminal cases. An offense cognizable in any Court is cognizable in that Court. If the offense be punishable by law, that Court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other, and must remain in full force, unless reversed regularly by a Superior Court capable of reversing it."

4. Judge McArthur, in his preface to 1 McArthur, Rep. V., uses the following language:

"In addition to the powers and jurisdiction of a Circuit Court and District Court of the United States the Supreme Court of the District has general jurisdiction in law and equity. It can also proceed in all common law and chancery cases in-

stituted before it, in which either of the parties reside without the District, as was done in the Supreme Court of Chancery in the State of Maryland on the 3d May, 1802."

The latter clause is taken from the Revised Statutes, District of Columbia, page 91, Section 768. To like effect is Newmeyer *vs.* Cowling, 6 Mackey (D. C.), 504.

5. Federal Statutes do not apply to the territorial Courts, unless these are expressly mentioned.

Clinton *vs.* Englebrecht, 13 Wall., 434.
Thiede *vs.* Utah, 159 U. S., 510.

The latter have the same general jurisdiction as the Supreme Court of the District.

6. Defendants cite the statute providing that the laws of the United States "not locally inapplicable" shall be in force in the District of Columbia. But obviously, as shown by the cases previously cited, this refers to general laws relating to rights, and not to institutional laws, providing for administration or limiting remedies. None of these apply to the District. It elects no Congressmen, has neither Circuit nor District Court, does not vote for Presidential electors, and retains the common law criminal jurisprudence which is not enforced in the Federal Courts, but is in those of the District, as before shown.

Defendants do not deny that the Circuit Court of the District has full jurisdiction in law and equity. This is expressly given by the law organizing it. It is clear that any general statute of the United States limiting the full equity jurisdiction of the Circuit Court of the United States is "locally

inapplicable" in the District of Columbia, for the simple reason that it is the only Court in the District having equity power. Congress has at various times, sometimes for political reasons, sometimes for reasons of convenience, limited the powers of the Federal Courts in the several States to a point much less than that allowed by the Constitution of the United States. None of these reasons has any application to the District of Columbia. When, therefore, in the revision of the statutes relating to the District, it is enacted that the Court has full equity power, the conclusion necessarily follows that any limitations upon the equity powers of the Circuit Court are just as inapplicable to the Supreme Court of the District, as the limitations in other respects imposed by general statutes upon the United States Circuit Court. When, therefore, defendants allege that the case is to be determined, not upon the inherent power of Courts of equity, but upon the power lodged in the Federal Courts under the statutes of the United States, it simply begs the question. Plaintiffs' argument may be put in the form of syllogism.

a. All Courts having full equity powers have power to strike out an answer for disobedience to an order of the Court.

Walker *vs.* Walker, 82 N. Y., 260.

See also cases cited under the Seventh Point.

b. The Supreme Court of the District has full equity power.

Statutes and Cases cited under Fifth Point.

c. Therefore, the Supreme Court of the District has power in such case to strike out an answer.

7. In the case of Hovey against McDonald, in the District of Columbia, the defense set up was really an affirmative defense As treated by the Supreme Court, it was wholly an affirmative defense. The striking out the answer and taking the bill *pro confesso*, did not authorize complainant to enter up judgment. It did authorize a hearing by the Court without reference to any allegations in the answer. This answer is to be found at pages 33 to 49 of the record. It admits McDonald's claim against the Government (p. 34, article 4). It admits the award upon this claim (page 36, fol. 11). It does not deny the making of the contract alleged in the bill which gave complainants a lien upon this claim, but alleges it affirmatively, and that it was obtained by fraud and false representations (pp. 38, 49). The prayer is in the nature of a cross bill and asks that the contract be cancelled or declared void and of no effect, and that complainants be enjoined from proceeding to enforce the collection of any sum under it.

The brief for the defendants in error admitted in the Court below that a Court of equity had always power to refuse to a person in contempt the right to take "aggressive proceedings."

The authorities are plain to this effect.

Coyle *vs.* Alleyne, 16 Beav., 548.
Lord Gort's Case, 1 Hogan, 77.
Valle *vs.* O'Reilly, *Ibid.*, 199.

These cases show that the practice was that defendant, when in contempt, "could not be heard to dispute or deny the plaintiff's case as disclosed by his bill, but he may be heard to point out the irregularity or impropriety of any application made by his antagonist." This is a sufficiently accurate

statement of the equity practice for the purpose of the present hearing.

McDonald was never denied a hearing in the Supreme Court of the District. He had full notice of all the proceedings that were taken there. It is true he declined to avail himself of this opportunity, but that was his own fault. His answer, which was an aggressive proceeding, as has been shown, and based entirely upon new and affirmative allegations on his part, was stricken out. But even this might have been reinstated at any time upon his coming into Court and restoring the fund which he had abstracted. There certainly never was a case of more flagrant trifling with a Court than this. There never was a case of a more obvious attempt to deprive parties of their legal remedies. If the judgment below should be affirmed it would crown with success an ingenious and obviously willful scheme to oust the Supreme Court of the District of a jurisdiction once regularly acquired.

8. It is further to be observed that the English cases cited are mostly cases of a mere technical contempt, as for example a failure to pay costs. They have really no application to a proceeding like that adopted in the District of Columbia, which was the only way open to the Court to give full effect to its confessed jurisdiction.

This answers the question of the Court of Appeals (Record, p. 138): "By what authority were the defendants deprived of their right to a trial, and a determination of the issues involved?" The authority was the general equity power, which has never been denied, and which is not limited by the Revised Statutes.

Sixth.

Effect of Section 725 of Revised Statutes.

Section 725, of the U. S. Revised Statutes, provides:

"The said Courts shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment, at the discretion of the Court, contempts of their authority, provided that such power to punish contempts shall not be construed to extend to any cases except" misbehavior, disobedience or resistance.

1. The chapter in which this section occurs relates to various Courts of the United States, but has no reference whatever to the Supreme Court of the District of Columbia. That is not one of "the said Courts." Section 711, for example, refers to the Supreme Court, Circuit Court and District Courts, and gives them jurisdiction in certain cases "exclusive of the Courts of the several States." Sections 715 and 718 refer to the Circuit and District Courts of the United States. Section 717 refers to the Supreme Court and the District Court of the United States.

That this is the true construction of Section 725 is made manifest by a consideration of the acts of which it is a codification. The original Judiciary Act of 1789, 1 U. S. Stat. at Large, 83, Section 17, provides as follows:

"All the said Courts of the United States shall have power to punish by fine or imprisonment, at the discretion of said Courts, all contempts of authority in any case or hearing before the same."

At this time there was no District of Columbia,

and no Court in the territory which was afterwards set off as the District, except the Courts of Maryland and Virginia. The only Courts mentioned in the judiciary act and referred to by the term, "the said Courts," are the Supreme Court of the United States and the Circuit and District Courts of the United States. No change was made in this law until March 2, 1831, when an act was passed (U. S. Stat. at Large, Vol. 4, p. 487), entitled "An Act declaratory of the law concerning contempts of Court." This enacts "that the power of the several Courts of the United States to issue attachments and inflict summary punishments for contempts of Court, shall not be construed to extend to any cases except" misbehavior, disobedience or resistance.

The occasion of passing this latter act was the power which some of the Courts had claimed to punish for constructive contempts, and the alleged abuse of the power by Judge Peck (11 Benton Abridgment Debates, pp. 33, 307). It has not by its terms, and was never intended to have, any effect upon the power of the Federal Courts over their proceedings, or to regulate the method in which they shall enforce the rights of suitors. The cases cited by the defendants, to the effect that the proceeding to punish for contempt is a criminal proceeding, show that the main object of such proceedings is not to enforce the rights of suitors, but to vindicate the dignity of the Court.

2. The argument that this section of the Revised Statutes has reference to criminal and not to civil contempts, is dismissed by the Court of Appeals with the observation (Record, p. 138) that "no such distinction is made in the Statute, or is made by the authorities construing the same."

This overlooks

Worden *vs.* Searls, 121 U. S., 14.

There, a proceeding was taken in a patent case to punish a party for violation of an order prohibiting the infringement of a patent. A fine was imposed to indemnify the complainant for the injury he had sustained. This Court held the patent invalid, and for this reason reversed the order.

At p. 26 the Court say :

"Though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff and to reimburse to him his expenses."

On this ground the Court distinguished the case from a previous one in which it had held that it could not review an order imposing a fine as a punishment for the violation of an injunction, because " contempt of Court is a specific criminal offense."

The same distinction is clearly stated by the New York Court of Appeals in People *vs.* Court of Oyer and Terminer, 101 N. Y., 245.

3. The observation quoted fails to consider that portion of the Act of March 3, 1863, giving to the Supreme Court of the District full equity powers, and the fact that Section 725 of the Revised Statutes contains no negative words except as to constructive contempts, which are not in question here.

It is not to be supposed that Congress, in passing the section of the Revised Statutes of the United States relating to contempts, intended to limit the

general equity power of the Court of the District of Columbia. These statutes should be construed so as to harmonize with each other. That is a general rule relating to all statutes in *pari materia*. So construed, the two statutes may stand together perfectly. The contempt statute applies to *quasi* criminal proceedings for the vindication of the dignity of the Court and the punishment of the offender. The equity powers of the Court relate to the relief of suitors and the enforcement of civil remedies.

Seventh.

The decree in the District of Columbia, not a punishment for contempt.

1. The object of the proceeding which was actually taken in the Supreme Court of the District of Columbia in Hovey against McDonald, was not to vindicate the dignity of the Court, but to enforce the rights of suitors. McDonald and White had left the District. No redress could be had in the suit until they should return to the registry of the Court the money which they had obtained from the Receiver. It is true, that when the first application was made for relief, it took the form of a motion to punish them for disobedience of the order requiring them to return the money into Court (p. 53). But the order made on this motion does not undertake to punish their contempt. It had by that time become obvious enough that such an order would be a *brutum fulmen*, owing to the inability of the Court to arrest defendants, and their refusal

to comply with its orders. Accordingly, a new and independent proceeding was taken by the plaintiffs. A new motion was made "that their answer be taken from the files of the Court" (p. 54). Their solicitors were served with notice (p. 55). This motion was granted, and it was directed that the cause proceed "as if no answer herein had been interposed." This order was made December 29, 1877 (pp. 55, 56). The defendants still remained in contempt, and the bill was taken *pro confesso* against them, February 12, 1878 (p. 56). The final decree was not rendered until April 17, 1878 (p. 74), three months and nineteen days after their answer was stricken out. Of all these proceedings defendants had notice.

The Court was not proceeding against them for a criminal contempt, but was exercising its equity power to strike out the answer of defendants who refused to obey the order of the Court. This is in no proper sense a punishment. It might as well be said that an execution upon a judgment is a punishment. It is simply one of the means which the Court employs in order to enable suitors to collect their just claims.

2. It is significant that no federal decision denying this essential power even to the Circuit Courts of the United States, is produced. These Courts would scout the idea that their wings have thus been clipped. This Court has always maintained their full equity jurisdiction.

McConihay *vs.* Wright, 121 U. S., 201, 206.

Boyle *vs.* Zacharie, 6 Peters, 648, 658.

Chapter 36 of the Laws of 1792 referred to in the

latter case, is codified in Section 913 of the U. S. Revised Statutes. It preserves "the principles, rules and usages which belong to Courts of equity." When construed in connection with Section 725, it is plain that the latter applies only to criminal contempts, and does not impair equity powers. This act was overlooked by the Court of Appeals.

3. The soundness of defendants' contention may be tested by the decisions under the New York Code and Revised Statutes. The Code of Civil Procedure, Sec. 8, defines criminal contempts. Section 9 provides that the punishment may be by fine or imprisonment or both. Section 14 defines contempts which prejudice the rights of suitors. Section 2266 prescribes that the punishment for the latter class of contempts may be "by fine and imprisonment or either." It adds, in language much stronger than the United States Statute. "The offence *must* be punished as prescribed in this title."

These sections are a codification of sections 1, 20, 22 of Title 13, Ch. 8, Part 3 of the Revised Statutes.

2 R. S., 534, 538 (552, 556, Edmonds Ed.).

Yet, under both statutes, the Court of Appeals and the Supreme Court held that a Court had inherent power to strike out a pleading for disobedience to its order, although no mention is made of such a power in the statute relating to contempts.

Walker *vs.* Walker, 82 N. Y., 260.
Gross *vs.* Clark, 87 N. Y., 272.

Brinkley *vs.* Brinkley, 47 N. Y., 40.
Gray *vs.* Gray, 84 Hun, 347.
Barker *vs.* Barker, 15 How. Pr., 568.
Farnham *vs.* Farnham, 9 How. Pr., 231.
Quigley *vs.* Quigley, 45 Hun, 23.

The Revised Statutes of New York, like those of the United States, contain no express provision prohibiting the exercise of common law power in reference to contempts. This remains, notwithstanding the statute.

People *vs.* Nevins, 1 Hill, 154.
Ford *vs.* Ford, 41 How. Pr., 169, 176.

The Court of Appeals do not dispute the correctness of these propositions. But they distinguish the case at bar, by stating that the Supreme Court of the District is a statutory Court, while the Supreme Court of New York is a constitutional Court. The statement is true, but does the conclusion follow? The statute already cited gives to the Supreme Court of the District "general jurisdiction in law and equity." This is just what the Constitution of New York confers on the New York Supreme Court. If, therefore, this language gives the latter Court power to strike out an answer, the same words must give the same power to the Supreme Court of the District. The Revised Statutes contain no negative words. How, then, can it be claimed that they take away power, conferred by a separate act.

4. The fallacy in the argument for defendants in error is well illustrated by their claim that the part of the decree adjudging a lien was a punish-

ment, and that this is not a punishment which a Federal Court has power to impose for disobedience of its order. When the record in the District of Columbia is read, it is obvious that this decree adjudged a lien because of the effect that the Court gave to the conduct of the defendants. It was held in the Supreme Court of the District that the conduct of the defendants amounted to an admission that the allegations of the bill were true. This may or may not be good law. Whether it was or not, no one supposed until the ingenious briefs of the defendants in that case, that it was imposed as a punishment or that any presumption of that sort against a wrongdoer could ever be treated as such.

See cases cited under Second Point.

The striking out the answer was not a punishment in any proper sense of the term. A punishment always has relation to the offender's guilt, either as a wrong to society or to the individual. It is as distinct from a remedy for the enforcement of a civil right, as a penal code is distinct from a civil code. Defendants' argument would lead to the conclusion that every judgment in a civil suit is a punishment. Every such judgment, when enforced, takes property from the person against whom it is rendered. But it was never claimed before that this was a punishment. Such an argument logically leads to the conclusion that all the safeguards which penal codes throw over the individual in criminal proceedings, are applicable to the orderly conduct of a civil suit, which is absurd.

5. The remedy resorted to in Hovey *vs.* McDon-

ald, is more like the presumptions, familiar in the rules of evidence.

"The presumption of innocence may be overthrown, and the presumption of guilt be raised by the misconduct of the party in suppressing or destroying evidence which he ought to produce, or to which the other party is entitled."

1 Greenl. Evid., Sect. 37.
The Slavers, 2 Wall., 350.
Graves *vs.* U. S., 150 U. S., 121.
Newman *vs.* Cordell, 43 Barb., 449.

6. In cases of specific performance, where defendant refuses to convey, in obedience to the order of the Court, and has left the jurisdiction, it is familiar practice to adjudge that a Master or Referee may convey the title. Will any one pretend that such a decree would be void? Why not, if the doctrine of the Court below is sound. If taking a bill *pro confesso* is a punishment for contempt why not also, a conveyance by a Master or Referee.

7. Defendants' admission that the Court has power in some cases to strike out an answer, is fatal to their contention. If striking out an answer is a punishment, and the Court has no power to impose any punishment excepting fine and imprisonment, then it is clear that striking out an answer would be beyond its power, whatever the ground.

The fallacy of defendants' argument on this point is clearly shown by the quotation from Fuller *vs.* Claflin. The order which struck out the answer in Hovey *vs.* McDonald was not the ending of the cause. It did not leave the action undefended, nor did it give the complainant a right to immediate

judgment. In point of fact, as already shown, it left the defendants in that suit ten months' time to defend it, and they had full notice of all subsequent proceedings.

8. The fallacy of the argument may also be illustrated by reference to the ordinary proceedings in a civil suit. An action is brought on a promissory note. The defendant has twenty days to answer. He does not answer. Plaintiff gets judgment, issues execution, seizes defendants' property and pays the debt. Would anyone pretend that this deprivation of defendants' right to the property was punishment for his failure to answer? No doubt, as this Court said in Cummings *vs.* Missouri, 4 Wall., 277.

"The deprivation of any rights * * *may be* punishment," but as the Court judiciously add in that case, "The circumstances attending the cause of deprivation determine the fact."

In the case in the District of Columbia, these circumstances were simple enough. There was a fund in Court, the subject of a litigation. The defendants possessed themselves of this fund under a judgment which the Court reversed. The plain duty of the Court to the suitors was to restore this fund. That was also the plain duty of defendants, instead of which they left the jurisdiction and carried off the fund. Can any one pretend that a Court of equity should give to such persons the same position that they would have had if the fund had remained in the custody of the Court? Yet, this is what defendants claim.

9. The record in Hovey *vs.* McDonald shows that the motion to strike out the answer was an entirely separate one from the motion to punish for con-

tempt. Defendants' brief asserts it was on the same ground. That may be true. But it was a different motion, made at a different time, and addressed to a different function of the Court. If a man is indicted in a Court having both civil and criminal jurisdiction, this indictment is no bar to a civil suit in the same Court, for the wrong alleged in the indictment. The grounds of the proceedings may be identical, but the rights of the defendant in each are radically different. The former are protected by one class of constitutional guarantees; the latter by another.

Eighth.

Defendants, as purchasers, *pendente lite*, bound by the decree.

The Court of Appeals near the end of their opinion seem to indicate that they might have held that the decree could not be impeached collaterally by McDonald, but might be by Riggs & Co. At page 138 of the record they say:

"As purchasers *pendente lite* Riggs & Co. took the risk of the litigation then pending, but in so doing did not assume the risk of any punishment that might be inflicted upon McDonald and White in an independent proceeding."

The Court may have resorted to this distinction to distinguish the case from Hovey *vs.* McDonald, 45 N. Y. Superior Court, 506, in which the Superior Court held that the original decree could not be impeached collaterally by McDonald. The distinction is not well taken.

1. The cases cited do not sustain it.

Conner *vs.* Reeves, 103 N. Y., 527, held that a judgment against a principal was presumptive evidence against a surety, although consented to by the principal. It conceded that the judgment would have been conclusive, if it had been rendered "upon hostile and adverse litigation" (p. 532). It states that such a judgment if obtained by collusion between the parties is not evidence at all against the surety.

All this we may admit. The judgment against McDonald certainly was obtained "upon hostile and adverse litigation." There is neither allegation nor finding of collusion between the parties. The alternative in the Conner case is what we claim here—viz., that it was conclusive.

Ferguson *vs.* Crawford, 70 N. Y., 253, held that a defendant might show in a collateral suit that the apparent jurisdiction of the Court over his person, in a previous action, was not real but obtained by a forged notice of appearance. This also we may concede. But there is neither allegation nor proof that McDonald's appearance in the Hovey suit was not *bona fide* and actual. This case is therefore unavailing, and no other is cited.

The learned Court evidently overlooked the decision of this Court in

Voorhees *vs.* Jackson, 10 Peters, 474.

"The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case, it is a record

importing absolute verity; in the other, mere waste paper. There can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained even an erroneous judgment or execution."

This language is quoted with approval by this Court in Laing *vs.* Rigney, 160 U. S., 531.

The "middle character" assigned to the decree in Hovey *vs.* McDonald is evidently, therefore, an impossible situation.

2. The decree in the Supreme Court of the District was in accordance with the prayer of the bill. It was based upon the admission of the truth of the allegations in the bill which the Supreme Court held to arise upon the facts proved in that case. It was, therefore, a legitimate conclusion of the *lis pendens*, and, under the decision of the Court of Appeals, on the first appeal, was binding upon the defendants as purchasers *pendente lite.*

Riggs & Company had the right to appeal from it, and to use McDonald's name on such appeal.

Ex parte Railroad Co., 95 U. S., 221.

They might have intervened in the Supreme Court and asked to be admitted to defend the suit.

Stout *vs.* Lye, 103 U. S., 66.
Eyster *vs.* Gaff, 91 U. S., 521.

3. The proceedings in the Supreme Court of the District were an exercise of the equity powers of the Court to enforce the rights of suitors. They were a continuation of the same *lis.* The best answer to the alleged hardship of the case may be given in the words of the Supreme Court, in

Hovey *vs.* McDonald, 109 U. S., 150, 162.

"It was in the power of the Special Term to have continued the injunction, and to have retained the fund in its control in the hands of the Receiver, had it seen fit to do so. Judging only from what appears in the record, we cannot refrain from saying that, in this case, the latter course would have been eminently proper. It would have protected all parties and produced injury to none."

Defendants' difficulty arises from their unseemly haste in buying and disposing of bonds upon which they knew a lien was claimed.

4. The appeal was a continuation of the *lis* which was, therefore, pending while defendants purchased, and they took, "subject to all its legal and equitable consequences."

Gore *vs.* Stacpoole, 1 Dow., 18, 31.
Stoddard's Lessee *vs.* Myers, 8 Ohio, 203.
Gibbon *vs.* Dougherty, 10 Ohio State, 365.

5. But defendants argue that there was no appeal pending at the time of the purchase by Riggs & Company. The cases cited under the fourth subdivision show that this is not material, unless there was laches in taking the appeal, which is not pretended. But the fact is not as stated. It is admitted that an appeal was taken from the decree of June 24th. This appeal was taken on the day the decree was rendered. It further appears that four days afterwards, without any notice to complainants, and while this appeal was pending, the Receiver, with extraordinary celerity, and acting from a motive which certainly is open to suspicion, hurried through a delivery to

the defendants and a contemporaneous purchase from them for his firm. A Judge of the Supreme Court of the district directed the pasting of a piece of paper on the decree of June 24th, which paper contained one additional clause directing the Receiver to deliver the bonds to McDonald and White (Exhibit 1, p. 389, fol. 1165.) This was but the logical result of the dismissal of the bill, and its addition was unnecessary. This Court so held in

Hovey *vs.* McDonald, 109 U. S., 150.

To say that this could vacate that decree, destroy the effect of the previous appeal, put an end to a *lis* which was *pendens* at that time, and all this without any notice to complainants, and for the benefit of parties occupying the position that the Receiver and the defendants did, is an extraordinary proposition. To give to such proceedings the effect claimed by respondents is certainly a deprivation of property without due process of law.

No doubt there are cases in which the Court for the purpose of obviating technical objections, and sustaining appeals that might otherwise fail, has treated an amended decree as displacing the original decree. But so far as the effect of the decree and of proceedings taken upon it is concerned, it was never contended that an amendment would vacate what had previously been done.

In Memphis *vs.* Brown, and Rubber Co. *vs.* Goodyear, the decision proceeded on the ground stated in the latter case, 6 Wall., 153, 155: "We must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings."

This was to make a new decree, from which an effectual appeal, with *supersedeas*, could be taken.

No such intent appears in Hovey *vs.* McDonald. The intent was held to be the contrary.

Hovey *vs.* McDonald, 109 U. S., 150.

6. The law on this subject is so clearly stated by the Court of Appeals on the first appeal, that we hardly need do more than quote from the opinion:

118 N. Y., 124, 134.

"The relation and situation of a purchaser *pendente lite* is such that his protection against the result of the then pending action must be sought in it, and for that purpose he may step in and defend, or the plaintiff in it, to charge him *in personam*, may cause him to be brought in as a defendant. (Harrington *vs.* Slade, 22 Barb., 161; *ex parte* Railroad Co., 95 U. S., 221.) And when the purchaser is so brought in and made a defendant, he will be treated as such party from the time of the commencement of the action, and consequently the statute of limitations will in such case be no more available to him than to the original defendants. And such would be the effect of the judgment as one *in rem*, although the purchaser is not made a party to the action. (Harrington *vs.* Slade, *supra;* Walden *vs.* Bodley, 9 How., U. S., 34; Fletcher *vs.* Ferrel, 9 Dana, 372; 35 Am. Dec., 143; Talbott *vs.* Bell, 5 B. Munroe, 320; 43 Am. Dec., 126; Jackson *vs.* Losie, 4 Sandf., Ch., 381.) This binding character and effect are deemed essential to the proper administration of justice and to put an end to litigation. (Bellamy *vs.* Sabine, 1 De Gex. & J., 566, 78.)"

Hovey *vs.* Elliott, 118 N. Y., 124, 134.

The same rule is well settled in this Court.

In Mellen *vs.* Iron Works, 131 U. S., 352, this Court says (p. 371):

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the Court; but they cannot demand, as of absolute right to be made parties, nor can they complain if they are compelled to abide by whatever decree the Court may render within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite.*

"As said in Bishop of Winchester *vs.* Paine (11 Vesey, 194, 197), the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed. Otherwise, such suits would be interminable: or, which would be the same effect, it would be in the pleasure of one party at what period the suit should be determined."

In 93 U. S., 168, Tilton *vs.* Cofield, this Court say:

"The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

To the same effect are:

Stout *vs.* Lye, 103 U. S., 66.
Eyster *vs.* Gaff, 91 U. S., 521.
Bellamy *vs.* Sabine, 1 De G. and Jones, 566, 578.
Leitch *vs.* Wells, 48 N. Y., 601.
Turner *vs.* Houpt, 53 N. J. Eq., 526, 553.

7. The Court of Appeals on the second appeal say that Riggs & Co. "did not assume the risk of any punishment that might be inflicted upon McDonald and White in an independent proceeding."

The cases cited show that they did take the risk of whatever judgment might be rendered against McDonald and White, and were bound by this judgment, just as much as if they had intervened in the suit and been personally heard by counsel. Can there be any question that if they had intervened and been heard by counsel, their only remedy would have been by appeal from the judgment, and that they could not have attacked it collaterally? Is it not then clear that they cannot now be heard to impeach it collaterally?

8. This makes it needless to consider the Referee's fifth finding of law that the plaintiffs had no lien on the bonds at the time of their sale to Riggs & Co. (p. 71, fol. 288). This is excepted to (p. 95). But as the suit is based on the rule of law as to purchasers *pendente lite*, and as the Court of Appeals decided this point in plaintiffs' favor on the first appeal, we need not elaborate it further.

9. Defendants argue that the judgment in the Supreme Court of the District only affects property, and is not a judgment against Riggs & Co. *in personam*. But it affects the title to property, and we sue them for the proceeds of this property which they have sold.

10. The judgment in the District of Columbia makes it unnecessary to consider the validity of the original agreement between McDonald and Hovey and Dole, which was the origin of their lien. The validity of such an agreement is, however, well settled.

Wright *vs.* Tebbitts, 91 U. S., 252.
Child *vs.* Trist, 1 McArthur (D. C.), 1.

Ninth.

Actual Notice to Riggs & Co.

The Court of Appeals say (Record, p. 138): "It does not appear that they ever had notice of the proceedings in contempt." That is irrelevant. Riggs had actual notice of the suit, and was appointed Receiver in it.

The bonds on their face show a transfer direct from Geo. W. Riggs, Receiver, to Riggs & Co. (p. 77), of which firm Riggs was a member (p. 73). Riggs himself made "personal application to the Judge holding the Court in which the decree was made" (p. 62). Notice to one of several partners is notice to them all.

3 Kent Comm., 105.
Weetjen *vs.* St. Paul & P. R. R., 4 Hun, 529.

"It has *never been doubted* that those who buy such securities from litigating parties, with actual notice of the suit, do so at their peril, and must abide the result, the same as the parties from whom they got their title."

Scotland Co. *vs.* Hill, 112 U. S., 185.
Lytle *vs.* Lansing, 147 U. S., 59, 71.

If they chose to become purchasers of the subject-matter of the suit, they were bound to follow up the proceedings. Their *laches* is no defense.

Tenth.

The lien follows the proceeds of the bonds.

Defendants converted the bonds into cash. The

lien is transferred to the proceeds and plaintiffs have the right to a personal judgment for the amount of the lien with interest.

"An equitable lien has the nature of or is analogous to a trust, and it is not for the party making the conversion into other securities to thus defeat the trust. He cannot derive any such advantage, but the substituted securities or proceeds in his hands are subject to it."

Union Stock Yards Bank *vs.* Gillespie, 137 U. S., 411, 421.
Hovey *vs.* Elliott, 118 N. Y., 124, 141.
National Bank *vs.* Ins. Co., 104 U. S., 54, 68.
Importers' & Traders' Bank *vs.* Peters, 123 N. Y., 272.
Holden *vs.* N. Y. & Erie Bank, 72 N. Y., 286, 296.
Deobold *vs.* Offermann, 111 N. Y., 531.
Moore *vs.* Williams. 62 Hun, 55 ; s. c. 16 N. Y. Supp., 493.

Eleventh.

The Bonds not negotiable.

Defendants claimed that the doctrine of purchase *pendente lite* does not apply to negotiable securities. This is no defense for two reasons.

1. Defendants had actual notice of the suit. When such is the fact, purchasers of negotiable securities are bound by the result of the litigation as if they were not negotiable.

Cases cited under Ninth Point.

2. The bonds were registered bonds, transferable only on the Treasury books, and therefore not negotiable. The Referee so found (p. 79).

The form of the bonds is found (pp. 105, 106). They were payable to George W. Riggs, Receiver, or assigns (fol. 313), have no words of negotiability, were registered in the U. S. Treasury (fol. 314), and any transfer of them was required to be executed and acknowledged before a United States official (fols. 316, 317).

Such an instrument is not negotiable.

> Mechanics' Bank *vs.* N. Y. and N. Haven R. R., 13 N. Y., 599, 623.

No proof as to the custom of trade, or of brokers that instruments should pass by delivery, and be treated as negotiable, would make them negotiable, if in law they were not. The whole case for plaintiff in Mechanics' Bank *vs.* N. Y., N. H. & Hartford R. R., was based on such evidence. It was on that evidence that the Superior Court gave judgment for the plaintiff. But the Court of Appeals reversed that judgment, and distinctly held that such evidence did not render instruments negotiable which the law did not make such.

"Usage never is, nor ought to be received to contradict a settled rule of commercial law."

> Frith *vs.* Barker, 2 Johns., 327, 335.
>
> Barnard *vs.* Kellogg, 10 Wall., 383, 391.
>
> Corn Ex. Bank *vs.* Nassau Bank, 91 N. Y., 74.
>
> Security Bank *vs.* National Bank, 67 N. Y., 458.

Twelfth.

Statute of Limitations.

The decision of the Court of Appeals as to the construction of the New York statute will be followed by this Court.

Osborne *vs.* State of Florida, 164 U. S., 650.

Union Bank *vs.* Louisville R. R., 163 U. S., 325.

1. Under the first decision in this case, reported 118 N. Y., 124, it is settled that the Statute of Limitations is not a defense to the suit. That decision controlled the decision of the second appeal, and was not in any way modified by the Court upon the second appeal.

Cluff *vs.* Day, 141 N. Y., 580.

Williamsburgh Sav. Bk. *vs.* Town of Solon, 136 N. Y., 465, 477.

Joslin *vs.* Cowee, 56 N. Y., 626.

Oakley *vs.* Aspinwall, 13 N. Y., 500.

The ground on which this case was decided on the first appeal was thus stated by defendant's counsel in the Court of Appeals:

"During the pendency of the action in the Supreme Court of the District of Columbia, prior to the final decree referred to, the plaintiffs, as against the defendants, had no concurrent remedy by action at law with that in equity, subject to the operation of the Statute of Limitations, and that during that time the statute did not run in favor of the defendants, and therefore was no bar to the relief sought by this action."

2. It is no answer to this argument as to the pre-

vious decision to say that the facts are changed, for they are not. The language of the original agreement, "payment is hereby made a lien," was found in the previous appeal book. These words obviously do not mean now, any more than they did then, an actual subsisting mortgage on particular bonds, entitling the lienor to immediate possession. They mean a right to proceed in a Court of equity for the purpose of enforcing the lien, which right is inchoate until judgment.

3. In any case it is plain that the right of action was merged in the judgment, and that whatever rights Hovey might have had before that judgment he must now proceed upon it. That gave him clearly a new right of action, and it is this right which he is now enforcing. The judgment in that suit would be a bar to a suit on the original cause of action.

Jones *vs.* Jones, 108 N. Y., 415.

The only doubt that existed as to the bar of the statute arose from a misconception of the action. This is not brought to enforce a lien under the original contract made by McDonald with Hovey and Dole, but to enforce a lien under a judgment of the Supreme Court of the District of Columbia.

This cause of action could not arise until that judgment was rendered. The original cause of action was merged in that judgment.

Gutta Percha Co. *vs.* Mayor of Houston, 108 N. Y., 278.

Thirteenth.

Plaintiffs now entitled to final Judgment.

The appeal comes up on the record, without any case containing evidence. The only available exceptions are to the conclusions of law from the facts found and to refusals to find as matter of law upon the facts. The Court should, therefore, make a final determination of the case, and end the delays which defendants have for sixteen years interposed, to the enforcement of a decree of a Court of general jurisdiction.

This Court has power to render such judg ment.

U. S. Rev. Stat. § 709.

This, also, is the well settled practice in New York.

New York Code, Sects. 998, 994, 1317.
Born *vs.* Schrenkeisen, 110 N. Y., 55 60.
Gourley *vs.* Campbell, 66 N. Y., 169.
Jackson *vs.* Andrews, 59 N. Y., 244.
Stoddard *vs.* Whiting, 46 N. Y., 627.
Wood *vs.* Baker, 60 Hun, 337.
Moore *vs.* Williams, 62 Hun, 55.

Fourteenth.

Judgment should therefore be rendered, reversing the judgment appealed from, and the judgment on the Referee's report, and remanding the cause to the Court of Appeals, with instructions to direct

judgment for plaintiffs for the amount of the lien adjudged by the Supreme Court of the District of Columbia, viz.: $49,297.50 (p. 75), with interest from the date of that judgment, April 17, 1878 (p. 74), with costs.

EVERETT P. WHEELER,
Of Counsel for Plaintiff in Error.

167-409

MAR 31 1897

CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 255.

CHARLES E. HOVEY, as Survivor of WILLIAM P. DOLE,
Plaintiff in Error,

v.

GEORGE ELLIOTT and GEORGE L. ELLIOTT, as Executors, etc., of JOHN ELLIOTT, Deceased.

Brief for Plaintiff in Error.

Also Appendix containing Opinion in full of the Court of Appeals of New York in Hovey v. McDonald, 118 New York, 132.

A. S. WORTHINGTON,
Of Counsel for Plaintiff in Error.

H. L. McQUEEN, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

CHARLES E. HOVEY, as survivor of WILLIAM P. DOLE, Plaintiff in error.

v.

GEORGE ELLIOTT and GEORGE L. ELLIOTT, as executors, etc., of JOHN ELLIOTT, deceased.

No. 255.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

In 1873, Augustin R. McDonald, claiming to be a British subject, had pending before the British and American Claims Commission, which was organized under the treaty of May 8, 1871, between the United States and Great Britain, a claim against the United States amounting to some two million dollars. In June of that year he employed Charles E. Hovey and William P. Dole to aid him in the prosecution of his claim. At the same time, by a contract in writing, he agreed to pay them for their services one-fourth of the amount which

might be allowed, and the payment of this compensation was expressly made a lien upon the claim, "and upon any draft, money, or evidence of indebtedness which may be paid or issued thereon" (Record 18). The Commission, in September, 1873, allowed McDonald on his claim $197,190 in gold. In October, 1874, Hovey and Dole filed a bill on the equity side of the Supreme Court of the District of Columbia against McDonald and one William White, in which they charged that McDonald, in August, 1874, had assigned to White the award in question. They prayed that the defendants might be enjoined from receiving or collecting more than three-fourths of the award, and that the lien of the complainants on the remaining fourth might be established by the court (15, 18.)

About the same time, another bill in equity was filed in the same court against McDonald and White by Thomas Jefferson Phelps. He claimed in his bill that in 1869 he had been appointed assignee in bankruptcy of McDonald; that McDonald had received his discharge in bankruptcy in March, 1869; and that in those proceedings McDonald had concealed the existence of his claim against the United States. In February, 1875, by consent of counsel for Hovey, Dole, Phelps, McDonald and White, respectively, an order was made which was entitled in Phelps' case, appointing George W. Riggs a receiver of one-half of the net amount of the award (60). The receiver invested the amount, which he received from the British Government under this order, in bonds of the District of Columbia, of which bonds $152,000 were registered bonds, and $300 coupon bonds (61).

A demurrer to the original bill in Hovey and Dole against McDonald and White having been sustained, in April, 1875, they filed an amended bill in which they set forth their claim more in detail. In their amended

bill they charged that the assignment to White was made with the fraudulent intention on the part of both McDonald and White of defrauding the complainants and other persons who had claims against the fund (20, 31).

On the 24th day of June, 1875, the Supreme Court of the District in Special Term made a decree sustaining a demurrer to the amended bill, and dismissing it with costs. On the same day, the complainants Hovey and Dole filed in the cause a formal appeal to the Court in General Term (61). On the 28th day of June, 1875, another decree was entered by the court in Special Term which was, in substance and almost in words, identical with the decree of June 24, 1875, except that there was added to it a clause directing the receiver "to pay the funds belonging to said cause" to the defendants, and thereon discharging the receiver. These two orders will be found in full on page 32 of the record.

On the 28th of June, 1875, after the second of these two orders had been made, Mr. Riggs, the receiver, under further verbal instructions from the justice who had made the order, delivered all the bonds which he held to McDonald (62). On the same day, McDonald sold the bonds in Washington to the firm of Riggs & Company, of which firm the receiver, George W. Riggs, was a member (62). Riggs and Company immediately surrendered the bonds to the Treasury of the United States, "and the title to said bonds was changed; the said bonds were surrendered to the said Treasury Department, and subsequently, other and new bonds were issued to the firm of Riggs and Company" (62). In December, 1875, Riggs and Company sold the re-issued bonds on the market (62).

On July 2, 1875, Hovey and Dole appealed to the General Term from the decree of June 28, 1875 (62). On July 12, 1875, they filed a supersedeas bond (62). There were in fact two such bonds filed—one to supersede each of the two decrees ("Defts.' Exhibit No. 1," pp. 89, 91).

In March, 1876, the Supreme Court of the District in General Term reversed the decrees of June 24, 1875, and June 28, 1875, and remanded the cause to the Special Term with leave to the defendants to answer (62). In May, 1876, they filed an answer accordingly (33–49). In their answer, they asked that it might be taken as in the nature of a cross-bill, and they prayed, among other things, that the contract under which the complainants claimed their lien might be cancelled, and that the complainants might be enjoined from enforcing in any other suit or proceeding the collection of the sum provided to be paid in that contract (49). To this cross-bill the original complainants filed an answer in due season ("Defendants' Exhibit No. 1," p. 28).

In May, 1876, the complainants Hovey and Dole having moved the Court in Special Term to require the defendants to restore to the custody of the court so much of the fund which had theretofore been turned over by the receiver to the defendants as was claimed by Hovey and Dole—$49,297.50—the counsel for the complainants, and Charles A. Ray, counsel for the defendants, requested the court to certify the motion for hearing in the first instance to the Court in General Term, which was done accordingly (51). Mr. Ray was the solicitor of record for the defendants, he having signed their answer in that capacity (49). The motion was argued by the respective counsel in the Court in General Term, and thereupon that court, on the 19th of June, 1877, ordered, adjudged and decreed that the defendants McDonald and White should pay over to the registry of the court the sum of $49,297.50 "without delay or defalcation" (52). A copy of this order was served on the defendant White on June 28, 1877. McDonald had absconded. A copy of the order was left at his last known place of residence in Washington, after fruitless efforts to ascertain his where-

abouts (53). These facts were brought to the notice of the Court in General Term by the counsel for Hovey and Dole, who moved the court for an order on McDonald and White to show cause "why they, and each of them, should not be punished for disobedience of the order of the court, directing them to pay the said money into the registry of the court, as for a contempt" (53). The counsel for the defendant were notified when this motion would be called up, but did not attend, and thereupon, on the 8th day of December, 1877, the Court in General Term declared that McDonald and White should "be taken and deemed to be in contempt of the aforesaid order of the court." This order contained also the following clause:

"That unless the said Augustin R. McDonald and the said William White, within six days from the entry of this order and the service of a copy thereof upon their solicitors, shall in all respects comply with the order of the nineteenth June, 1877, and pay into the registry of this court the sum of forty-nine thousand two hundred and ninety-seven dollars and fifty cents, in gold, the answer filed by them in this cause be stricken out, and that this cause proceed as if no answer therein had been interposed. And that until the said defendants shall comply with the said order of nineteenth June, 1877, all proceedings on the part of the said defendants in this cause be, and the same are hereby, perpetually stayed." (54, 63.)

The opinion of the court in General Term upon which this order was made will be found in Hovey *v.* McDonald, 3 MacArthur, 184. The court said "If the party flees the jurisdiction of the court after he has contemned and disobeyed its orders, he can not further be permitted to prosecute or defend his suit until he purges himself of his contempt."

A copy of this order of December 8, 1877, was duly

served upon the solicitors of the defendants, and the same solicitors were notified that on the 29th of December, 1877, the Court in General Term would be asked to strike the answer of the defendants from the files for non-compliance with the order. The defendants' solicitors paid no attention to this notice, and thereupon the Court in General Term, on the 29th of December, 1877, directed that the answer of the defendants "be stricken out and removed from the files of the court, and that this cause do proceed as if no answer had been interposed," and further directed that until the defendants should comply with the order requiring them to pay $49,297.50 into the registry of the court all proceedings on their part in the cause should be stayed (55–56, 63).

On the 12th of February, 1878, the Court in General Term made another order reciting that the answer of the defendants had been removed from the files for their contempt, and declaring "it is now ordered, adjudged and decreed that the bill be taken *pro confesso* against them" (56, 63).

On April 17, 1878, the Court in General Term made a final decree in the cause which recited that the defendants were still in contempt, and had failed to restore to the registry of the court the sum of $49,297.50, and which found the facts upon which the claim of the complainants were based to be true, made absolute the decree *pro confesso*, and directed the defendants McDonald and White to pay to the complainants the sum of $49,297.50, in gold. The decree concluded in the following words:

"And it is further ordered, adjudged and decreed that the complainants have a lien upon the claim of Augustin R. McDonald against the United States, as awarded by the Mixed Commission of British and American Claims under the treaty of May eighth, 1871, of one hundred and ninety-seven thousand one hundred and

ninety dollars in gold, and upon any draft, money, evidence of indebtedness or proceeds thereof, with legal interest from this date" (57, 58, 63).

After obtaining this final decree in their favor Hovey and Dole in the same cause proceeded against the receiver, Mr. Riggs, upon the theory that in paying over to the defendants the money in his hands while an appeal was pending, and within the time allowed for the filing of a *supersedeas* bond, he was not protected by the order of the Court in Special Term, in pursuance of which he had made the payment. The Supreme Court of the District of Columbia decided this question in favor of the receiver, whereupon Hovey and Dole appealed to this court. Here, the receiver made a motion to dismiss the appeal, upon the ground that he was not a party to the suit and on the further ground that the Supreme Court of the District of Columbia had no jurisdiction to pass the decree of April 17, 1878. The court overruled his motion, but, on the merits, held that he was justified by the order of the court under which he acted in paying over the fund to the defendants. Justice Bradley, in delivering the opinion, observed that it was in the power of the Special Term to have retained the fund in its control pending the appeal to the General Term, and added: "Judging only from what appears in the record, we cannot refrain from saying that, in this case, the latter course would have been eminently proper. It would have protected all parties and produced injury to none. But if the court failed to do what it might properly have done, such failure ought not to be visited upon the receiver, who was the mere instrument and hand of the court, and subject to its order" (Hovey *v.* McDonald, 109 U. S., 150–162.)

The opinion of this court was filed on November 5, 1883. In April, 1884, Hovey and Dole brought an action

in the Superior Court of the City of New York against John Elliott and others, as surviving partners of Riggs and Company. In their complaint the complainants stated the substance of the proceedings in the original cause in the District of Columbia and sought to assert their lien against Riggs and Company upon the ground that they had purchased the bonds in question, pending the suit in the Supreme Court of the District of Columbia, and were bound by the decree of that court (8, 9). Of the defendants, only one, John Elliott, was served with process in New York. By his separate amended answer he set up, among other things, the defense of the New York Statute of Limitations—six years (113–115.)

At the first trial of the case the complaint was dismissed on the ground that the action was barred by the Statute of Limitations, but on appeal this judgment was reversed by the Court of Appeals. Its opinion will be found in Hovey *v.* Elliott, 118 N. Y., 124, and a copy of it, for the convenience of the court, is appended to this brief. It will be seen that as there was practically no dispute as to any material fact this was an adjudication in favor of the plaintiffs upon all the points then in controversy. The following extract will show this:

"The defendants' firm having purchased the bonds of McDonald & White, or one of them, *pendente lite*, charged with knowledge of the pending action and its purpose, were bound by the result of the litigation in the suit against McDonald & White as effectually as if they had been parties to it, so far as related to the lien of the plaintiff on the bonds. * * * .

"In view of the relation of privity in which the defendants were placed with McDonald & White, by force of the doctrine of *lis pendens*, somewhat broadened by the fact of actual notice on their part of the situation, it became the duty of defendants, when the decree was obtained against McDonald and White, to pay to plaintiffs,

from the proceeds of the sale of the bonds, an amount sufficient to satisfy their lien upon them. * * *

"And concurrently in time with the arising of such duty, accrued to the plaintiffs the right to demand its performance."

During the proceedings the defendant John Elliott died, and the case was revived against his executors, the present defendants in error.

The Court of Appeals having ordered a new trial, the defendants amended their answer—the principal change being to set up that the final decree of the Supreme Court of the District of Columbia in General Term, made on the 17th day of April, 1878, was void, because, under the Constitution and the laws of the United States, that court was without jurisdiction to render that decree (10–14). The case, upon the amended pleadings, was sent to Daniel G. Rollins as a referee. The facts ascertained by him will be found in the record, pages 59 to 79 and 81 to 92. His rulings on the questions of law will be found on pages 79, 80, 81, 92, 93 and 94. It will be seen, that both upon questions of fact and questions of law the referee's findings and rulings sustained the plaintiff's right to recover in the action, except that he held, as a conclusion of law, that the Supreme Court of the District of Columbia had no jurisdiction to render the decree of April 17, 1878, and that the same was and is null and void (p. 93, finding fourth).

On the 14th of May, 1892, a final judgment in favor of the defendants was entered in the Superior Court of New York upon the report of the referee (6, 7).

On October 27, 1892, this judgment was affirmed at a General Term of the Superior Court (126, 127). On the 7th of October, 1892, the plaintiff Hovey appealed to the Court of Appeals (127, 128). His co-plaintiff Dole had died after the first appeal was determined (128, 129).

Upon the hearing of the second appeal the Court of Appeals affirmed the judgment of the Superior Court (1 29 130). The opinion of the Court of Appeals on the second appeal was delivered by Haight, J., and will be found in the record on pages 130 to 138. It will be seen that the sole ground of the decision was that the Supreme Court of the District of Columbia was without jurisdiction to render the final decree of April 17, 1878.

To have this judgment of the Court of Appeals reviewed here, the plaintiff sued out his writ of error and gave bond according to law (1, 2). The appearance of the defendants in error has been duly entered in this court, and a stipulation has been filed here, signed by counsel for all the parties, in relation to a printed volume containing 1,492 pages, marked "Defendants' Exhibit No. 1" (140). This exhibit was offered in evidence by counsel for the defendant in error. It is a complete transcript of all the proceedings in the original cause in the Supreme Court of the District, including the evidence.

The Federal question involved in this proceeding is the failure of the Court of Appeals of New York to give effect to the decree of a court created by and acting under the authority of the United States (Dupasseur *v.* Rochereau, 21 Wall., 130; Embry *v.* Palmer, 107 U. S., 3; Sec. 709, R. S.).

Assignments of Error.

The court below erred:

I. In failing to give full faith and credit to the decree of the Supreme Court of the District of Columbia set forth in the complaint herein, or to give to said decree the same faith and credit as it has by law and usage in the courts of the District of Columbia.

II. In holding that the Supreme Court of the District

of Columbia had no power or jurisdiction to render the decree set forth in the complaint.

III. In holding that Section 725 of the United States Revised Statutes applied to the Supreme Court of the District of Columbia, and that by reason of said section the said court had no power to make the order in the suit of Hovey and Dole, complainants, against McDonald and White, defendants, directing that the answer of said defendants be removed from the files.

IV. In holding that the said order and decree of the Supreme Court of the District of Columbia were rendered as a punishment of the defendants, McDonald and White.

V. In holding that the said decree was not enforceable in the courts of the State of New York against the defendants in this action.

VI. In not rendering final judgment in favor of the plaintiff in error and against the defendants in error for the amount demanded in the complaint, and in accordance with the terms of the said decree of the Supreme Court of the District of Columbia.

ARGUMENT.

It will be seen from an examination of the opinion of the Court of Appeals of New York in this case that it held that the action taken by the Supreme Court of the District of Columbia in striking out the answer of McDonald and White and entering a final decree against them was a punishment for their contempt; that Section 725 of the Revised Statutes of the United States forbids such punishment; and that the decree was therefore void. Section 725 is in the following words:

"*The said courts* shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

This section of the Revised Statutes is in the general heading, "The Judiciary," and sub-heading, "Provisions common to more than one court or judge." Some of the sections in this chapter refer to "The courts of the United States"; some to "The Supreme Court and the Circuit and District Courts," and some to "The judges of the Supreme Court and of the Circuit and District Courts." This particular section is taken from an act of March 2, 1831, entitled "An act declaratory of the law concerning contempts of court" (4 Stat., 487). The original act begins, "That the power of the *several courts of the United States* to issue attachments and inflict summary punishments for contempts of court shall be construed," etc.

By Section 17 of the Judiciary Act of 1789, it had been provided that, "All the said courts of the United States * * * shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same" (1 Stat., 83).

It was held by this court in *Ex parte* Robinson, 19 Wall., 505,—a case originating in the District Court of the United States for the Western District of Arkansas—that the power of the "courts of the United States" to

punish for contempts is limited and defined by the act of 1831. A doubt is suggested in the opinion as to whether the act would apply to this court, but it was held that it does apply "to the Circuit and District courts."

It will be seen, therefore that the questions to be considered here are the following:

1. Was the decree of April 17, 1878, entered against McDonald and White as a punishment for contempt?

2. If it was, does Section 725 of the Revised Statutes apply to the Supreme Court of the District of Columbia?

3. If it was not, did that court nevertheless exceed its jurisdiction when it directed the answer to be struck out, and subsequently caused the decree to be entered?

4. If the court did err, either in failing to regard the provisions of Section 725, or in transcending its powers in striking out the answer, is its final decree in the case on that account void in a collateral proceeding?

We will consider these questions in their order.

I.

The action of the Supreme Court of the District of Columbia in striking out the answer of McDonald and White and in entering first a decree pro confesso, and afterwards a final decree, was not in the nature of a punishment of the defendants for their contempt, nor within the purview of Section 725, even if that section applies to that court; but was in the nature of civil process for the benefit of the complainants.

This proposition seems to us to be a clear one and to be sufficient of itself to entitle the plaintiff in error to have the judgment of the Court of Appeals in this case reversed. In the opinion of that court all that is said upon this subject is contained in the last paragraph thereof (138), and is in substance that if the answer was not struck out as a punishment, then the court had no au-

thority to deprive the defendants of their rights to a trial and determination of the issues involved, and that the contention that Section 725 "has reference to criminal and not civil contempts" rests upon a distinction not found in the statutes or in the authorities construing the same.

We submit, on the contrary, that where a party to a suit refuses to comply with an order of the court made for the benefit of the other party, any subsequent measure taken by the court to coerce the delinquent into the performance of the order is to be considered a step taken in a civil cause and not an order made in a distinct and criminal proceeding. If this be true, it necessarily follows that Section 725 has no application whatever to such coercive measures.

This precise question was determined by this court in Worden *v.* Searls, 121 U. S., 14–25. That was a suit in equity for the alleged infringement of certain letters patent. A preliminary injunction had been granted by the Circuit Court, which the defendants had violated, and they were adjudged to be, for that reason, guilty of contempt, and by orders entitled in the cause the court required them to pay to the complainant, as a fine, $250 and costs, and to stand committed until paid, and to pay a further fine of $1,182 to the clerk for the benefit of the complainant, and to stand committed until it was paid. The $1,182 was made up of $682 profits made by the defendants and $500 expenses incurred by the complainant in the contempt proceedings. In the Circuit Court a final decree was subsequently entered sustaining the patents and granting relief accordingly. On appeal, this court held the patents void and decided to reverse the decree. Then arose the question whether the above mentioned orders were interlocutory orders in the case which might be reviewed by this court, or whether they

were orders in a criminal case which could not be reviewed. It was held that they might be reviewed, the court observing that "though the proceedings were nominally for contempt, they were really proceedings to award damages to plaintiff, and to reimburse him for his expenses." Accordingly it was held that these interlocutory orders fell with the final decree, and they were reversed *without prejudice to the power of the court below to punish for contempt in a proceeding instituted for that purpose.*

It does not seem necessary to us to go beyond this case upon the question now under consideration, but inasmuch as the Court of Appeals of New York seems not to have considered it applicable to the case in hand, and inasmuch as counsel for the defendants in error earnestly contend that the decree of April 17, 1878, was in the nature of criminal punishment, we proceed to refer to other authorities in this and other courts, which, we think, sustain our view of the matter.

In 4 Black Com., 285, the author in referring to contempts "committed by parties to any suit or proceeding before the court, as by disobedience to any rule or order made in the progress of a cause," says: "Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by the general act of pardon."

This distinction between criminal contempts and the mere failure to comply with an order of court is well stated in an excellent English work on the subject of contempt, by James Francis Oswald, Q. C. He says:

"The distinction between contempts of a criminal nature and contempts of a nature not criminal was dealt with by the Court of Appeal in the case of O'Shea *v.* O'Shea, 15 P. D., 59; Reg. *v.* Barnardo, 23 Q. B. D., 305; and in *In re* Freston, 11 Q. B. D., 545, and by Chitty, J., in Harvey *v.* Harvey, 26 Ch. D. at p. 651. A contempt to be criminal must be so in its nature or by its incidents; and must be an offense which '*savours of criminality*' (see *per* Lord Brougham in Lord Wellesley's case, 2 R. & M., at p. 667). The distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice are criminal in their nature; but that contempts in disregarding orders or judgments of a Civil Court (or, as Cotton, L. J., stated in O'Shea *v.* O'Shea, *supra*, in not doing something ordered to be done in the cause) is not criminal in its nature." Oswald on Contempts (Second Edition), 98, 99.

Again, the same author says:

"It is difficult to draw the line between contempt which is a *civil wrong* only and a contempt which is a *criminal wrong;* but it is submitted that contempt is merely a *civil wrong* where there has been disobedience of an order made for the benefit of a particular party, and that person sets the court in motion to punish the disobedience; * * * and that contempt is a *criminal wrong* where either the court itself takes cognizance of the offence without being set in motion, or, being set in motion, has to deal with an alleged offence which is a public wrong as being an interference with the course of justice before or during the trial or hearing." Oswald on Contempt, 220, 221.

In McMicken *v.* Perin, 20 How., 133, this court had remanded a case to the Circuit Court in Louisiana affirming a decree of that court requiring McMicken to make a certain conveyance of real estate to Perin. McMicken having refused to execute the deed an at-

tachment was issued to compel him to perform the decree. McMicken undertook to appeal to this court from the order directing the attachment to issue. His appeal was dismissed, the court saying: "The tender and deposit of the money in court was all that Perin was required to do, to authorize the court to attach McMicken for a contempt, in refusing to make the conveyance. This involved no new question or decision, but was the ordinary means of enforcing the original decree. In no sense was this a final decree on which an appeal could be sustained. *It is, in effect, the same as ordering an execution on a judgment at law*, which had been affirmed on error, and remanded for execution to the Circuit Court."

In Delgado's case, 140 U. S., 586, a mandamus had been issued by a territorial court in New Mexico to a county clerk requiring him to recognize one of two contesting boards of county commissioners. He refused to comply with the order and was imprisoned until he should purge himself of his contempt. Instead of taking steps to review the order directly, he filed a petition for a writ of *habeas corpus* in the Supreme Court of the Territory. That court having denied the writ, he appealed to this court, and here it was held that a certain statute upon which the petitioner relied was intended to limit the fine for past neglect of official duty, and that it "does not exclude the power of the court to punish for disobedience of the writ, *or* to compel obedience to the writ by imprisonment until compliance."

In a suit in equity for violation of a patent, the defendant, having violated a preliminary injunction, was ordered to pay certain sums to the plaintiffs or stand committed. He was discharged from confinement under the Poor Debtor's Law of Massachusetts. The plaintiffs thereupon moved to have him recommitted under the original order, on the ground that the first order was a

final judgment in a criminal case to which the Poor Debtor's Law had no application. The motion was denied. It was heard before Lowell, Circuit Judge, and Nelson, District Judge. Judge Lowell delivered the opinion. He said:

"The process of contempt has two distinct functions—one criminal, to punish disobedience; the other, civil and remedial, to enforce a decree of the court and indemnify private persons. In patent cases it has been usual to combine the two."

Judge Lowell then remarks that Judge Blatchford once thought differently, but changed his mind—referring to Mullee's case, 7 Blatch., 23; Hayes *v.* Fischer, 102 U. S., 121, and Fischer *v.* Hayes, 7 Fed. Rep., 96. He gives a very thorough examination to this subject, and shows that such orders as the one he had under consideration are not criminal, and are not covered by Section 725 of the Revised Statutes, and are "beyond the King's pardon." He refers also to the case of Rex *v.* Edwards, 9 B. & C., 652, in which the Lord Chief Justice said that it had "always" been held that attachments for non payment of money were in the nature of civil process. He also says that:

"Where a person had been committed to prison *for nine months* for contempt in not paying money into a county court, sitting in bankruptcy, James, L. J., said: 'The order on the face of it is wrong, for it is an absolute order of commitment for contempt of court for non-payment of money. This is a penal sentence. The Court of Chancery never made an order in this form'; and again, 'The order of commitment was such as had never been made in the Court of Chancery, and was justly characterized by the Chief Judge as novel and surprising.' *Ex parte* Hoosan, L. R., 8 Ch., 231."

Hendryx *v.* Fitzpatrick, 19 Fed. Rep., 810.

In another equity case, one Graves had been ordered by the U. S. Circuit Court in Illinois to pay the sum of $100,000 into court. He did not obey the order and was adjudged "guilty of contempt" and it was ordered that he should be committed to jail till he complied with the order or should be discharged by due process of law. He fled to Iowa, whereupon United States District Judge, Shiras, holding a Circuit Court of the United States, was asked to have him arrested as a fugitive from justice under Section 1014, R. S., upon the ground that the proceeding against him in Illinois was a criminal one under Section 725, R. S. The order was refused, Judge Shiras saying:

"It will not do to confuse a remedy of a civil nature, used merely as a means of compelling obedience to an order for the payment of money in a civil suit with a proceeding in which it is charged that a criminal offence has been committed." (*In re* Graves, 29 Fed. Rep., 60).

So in U. S. *v.* Cimon., 21 Fed. Rep., 765, Judge Hammond, in discussing this question, said:

"There are two classes of contempts in courts of equity known as ordinary and extraordinary, though in modern times they have been called civil and criminal. In ordinary or civil contempts, there was only a controversy between the parties, not involving the element of offence to the court, or rather to the king, in the fact of disobedience; though technically and in form that element was the *gravamen* of all processes of contempt. In extraordinary contempts, the existence in fact of disrespect of authority was punished as an offence. The one was merely remedial, the other punitive or disciplinary."

A well considered case in which this distinction between criminal punishment and a proceeding to compel obedience to an order of the court is Phillips *v.* Welsh, 11 Nev., 187. In that case, the defendant had done an act which he was prohibited from doing by a final in-

junction, and having been fined for such contempt, it was held that he could not appeal, because it was a judgment in a criminal case. The court says that if he had simply neglected to do something which the court had ordered him to do for the benefit of the other party, it would have been a civil contempt, and an order seeking to coerce him into doing what the court had directed him to do would have been an order in a civil case, and therefore appealable.

In Tome's Appeal, 5 Pa. St., 285, a dismissed executor had been ordered by the court to turn over to his successor the assets of the estate in his hands. He did not turn over the assets, and it was ordered that he should stand committed until he should obey. He had previously been convicted in a criminal court of the embezzlement of the same fund, or a part of it. The Supreme Court of Pennsylvania held:

1. That "Whatever may be the criminal nature of the disobedience which brought him into contempt, the attachment in this case partakes of the nature of a civil remedy to enforce obedience to a decree, not merely to punish the contempt."

2. That a Pennsylvania statute forbidding imprisonment for debt did not apply to the case, as it excepted debts growing out of dereliction of duty.

3. That the law, prohibiting punishment by summary process for contempts not committed in open court, had no application, for the reason that the process resorted to in the case was "not used as punishment, but as the means of remedy."

In Buch *v.* Buck, 60 Ill., 105, a defendant had been attached for contempt, for not complying with an order of a court of equity, requiring him to maintain an adopted child. The court said:

"The attachment for this species of contempt, for disobedience of an order to pay money, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. 4 Black. Com., 285; Crooks *v.* The People, 60 Ill., 535."

In Cobb *v.* Black, 34 Ga., 162, the petitioner was imprisoned because he had refused to deliver certain property to a receiver, under the order of a court of equity. The court had directed that he should be imprisoned "until he should deliver the property to said receiver."

The Constitution of Georgia provides that "The power of the courts to punish contempt shall be limited by legislative acts." Section 4593 of the Code of 1862 made in performance of this constitutional provision is identical with Section 1 of the Act of Congress of March 2, 1831—Section 725 R. S. Section 242 of the Georgia Code provides that "the Superior Courts have authority to punish contempt by fine not exceeding $200, and by imprisonment not exceeding twenty days." It was contended that under these provisions the judge exceeded his power in directing the petitioner to be imprisoned indefinitely, until he should comply with the order of the court, and that he should have limited the imprisonment to twenty days. But the Supreme Court of Georgia held that those provisions of the law refer to attachments for contempt which are purely punitive—that they apply where an act has been done such as disturbing the regular proceedings of the court, or resisting its authority, or reflecting contempt upon it. To prevent a repetition of the offence and deter others from its commission in the future the power of inflicting summary punishment is given. The act having been done, when the punishment is inflicted the whole matter is at an end. But there are cases, said the court, like the one before it,

where the process of attachment is remedial. The court orders or decrees that a party regularly before it do a certain act necessary to the administration of justice, and the party refuses to do it. As the only means of compelling obedience to a further administration of justice, courts in such cases have the power to imprison the refractory party until he shall obey the precept. The object in such a case is not to punish for an *act done* in contempt of the court, but to compel the doing of an act necessary to the administration of justice.

An unfailing test in the Federal courts to determine whether a certain order is in the nature of criminal punishment is to enquire whether or not it is the subject of review in a higher tribunal. In *Ex parte* Robinson, 19 Wall., 513, the court below had undertaken to punish a lawyer for contempt by disbarring him. He appealed from the order disbarring him to this court, where his appeal was dismissed because it was a criminal case, in which neither an appeal nor a writ of error would lie. And, as we have seen, the court in another and independent proceeding, granted Robinson a writ of mandamus to the judge who had disbarred him, requiring that he be reinstated, because Sec. 725 R. S. limits the punishment for contempt by the courts to which it applies to fine and imprisonment (19 Wall., 505). So, in *Ex parte* Kearney, 7 Wheat., 38, where a witness had been committed for contempt by the Circuit Court of the District of Columbia for refusing to answer a question which the court held proper; and in New Orleans *v.* Steamship Co., 20 Wall., 387, where the mayor of New Orleans had done an act in violation of an order of the court below for which he had been fined $300 for contempt; this court held that it had no power to review the judgments, because they were judgments in criminal cases.

Now, can it be contended for a moment that if an appeal had been taken in due season from the final decree against McDonald in the Supreme Court of the District of Columbia, this court would have been without jurisdiction to entertain the appeal for any such reason? Such an idea seems to us to be simply preposterous! Yet, if it was an appealable decree, it was not a punishment for contempt, and the whole argument of the other side falls to the ground. And in fact he did appeal—his appeal being dismissed because it was not taken in time (Hovey *v.* McDonald, 110 U. S., 619).

Another test in such cases is whether the party affected by the order or decree can be relieved by the President's pardon. Can it be seriously suggested that the decree of April 17, 1878, establishing a lien in favor of Hovey and Dole against the fund involved in the suit in which the decree was made, can be wiped out by the President of the United States? If so, where would it leave the parties to the litigation in respect of the suit itself? Indeed, if the contention of the counsel for the defendants in error be correct, that that final decree was not an adjudication of the merits, but simply a punishment for contempt, the case is still open for a hearing on the merits, and we would have this remarkable condition of things, that while a final decree absolutely determining the merits of the case in favor of one of the parties stands upon the record, the parties to that litigation are to go on with it just as though there had been no determination of the merits at all!

If, however, it should be held that the decree of April 17, 1878, with the orders which led up to it, was intended

solely as a punishment for contempt, the question then arises whether there was in existence at that time any statute which prohibited that court from punishing contempt in that way.

II.

The Supreme Court of the District of Columbia, when sitting as an equity court, is governed in matters of procedure, including punishments for contempt, by the practice of the Court of Chancery in England prior to the Revolution, and the statutes regulating punishments for contempt in the courts of the United States have no application.

The Court of Appeals of New York held that the acts of Congress in question do apply to the Supreme Court of the District of Columbia, because it seemed to that court to be apparent that the Supreme Court of the District of Columbia and the Circuit courts of the United States are "placed upon the same footing and invested with the same jurisdiction and powers"; and because Congress has provided by an act of 1871 (Sec. 93, R. S. D. C.) that "the laws of the United States which are not locally inapplicable shall have the same force and effect within the District of Columbia as elsewhere within the United States" (135).

Section 17 of the Judiciary act of 1789 (1 Stat., 83) is in the following words:

"Sec. 17. *And be it further enacted*, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trial have usually been granted in the courts of law; (a) and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; (b) and to make and establish

all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."

In 1789 there was no District of Columbia, and consequently no courts therein in which that act could take effect. By Sec. 27 of the act of February 13, 1801, entitled "An act to provide for the more convenient organization of the courts of the United States," the Circuit Courts of the United States established by the act of 1789 were abolished (2 Stat., 89, 98). That act created new Circuit Courts, and Sec. 10 invested them with the powers theretofore granted to the former Circuit Courts except as otherwise provided by the act itself (2 Stat., 92).

Two weeks afterwards, by the act of February 27, 1801, (2 Stat., 103) Congress for the first time provided for the organization of courts in the District of Columbia. Section 1 of that act provided, "That the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States and by them accepted as aforesaid." Section 3 created the Circuit Court of the District of Columbia, and provided that "the said court and the judges thereof shall have all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States." And Section 5 gave to the Circuit Court of the District cognizance (1) of all crimes and offenses committed in the District; (2) "of all cases in law and equity between parties both or either of which shall be resident or be found within said District"; (3) of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; (4) of all seizures on land or water under the laws of the United States, and (5) of all penalties and forfeitures under those laws.

It will be seen that when the act of February 27th, 1801, gave to the Circuit Court of the District the powers then by law vested in the Circuit Courts of the United States, reference was made to the courts created by the act of February 13, 1801. There was no provision in the latter act relating to contempts except as it might be contained within the general grant to the courts created by that act of the powers granted by the act of 1789 to the Circuit Courts thereby created. But assuming that the effect of this provision in the act of February 13, 1801, was to bring forward and apply to the new courts created thereby the provisions of Section 17 of the act of 1789, it is manifest, we think, that the powers of the Circuit Court of the District of Columbia in matters of the kind now under consideration were controlled by the provision of the act of February 27, 1801, which continued in force the laws of the State of Maryland, and not by the provision which gave that court the powers of a Circuit Court of the United States. All the powers granted by Section 17 of the act of 1789 are those which would unquestionably have been rightfully exercised by those courts even if that section had been omitted from the act. The power to grant new trials, to punish for contempt, and to make rules for the orderly conduct of business are inherent in all courts. These provisions were not intended to restrict or restrain the Circuit Courts of the United States in any way, but to give them the powers which were held by all other courts of similar dignity; hence there was no reason why that section should have been referred to in Section 3 of the act of February 27, 1801, because Section 1 of the latter act had already provided that the laws of the State of Maryland should continue in force in the District. Would anyone question, for instance, that if there was at that time in force in Maryland any statute which limited or regulated

the exercise of the power of the courts of that State in granting new trials or in punishing for contempt, or making rules, the Circuit Court of the District would have been subject to those restrictions as a part of "the laws of the State of Maryland"?

The act of March 2, 1831 (4 Stat., 487), did not in any way further restrict the power of the courts of the United States in reference to punishments for contempt, but merely defined and limited the cases in which that power could be exercised, and as that act expressly applies to the case of the disobedience by a party of any order or decree of the court, neither that statute, nor Section 725 of the Revised Statutes, in which it was subsequently incorporated, would seem to have any pertinency here.

But, as the court below bases its judgment entirely upon Section 725 (Record, 135), we proceed to enquire whether, as a matter of fact, that section or the act of March 2, 1831, from which it is taken, does apply to the Supreme Court of the District of Columbia.

In a great case which received from this court the most careful consideration, it was held in 1838 that changes made by law in the powers of the Circuit courts of the United States or of the judges thereof after February 27, 1801, did not apply to the Circuit Court of the District of Columbia. (Kendall *v.* U. S., 12 Pet., 524–624).

By Section 16 of an act passed March 3, 1863 (12 Stat., 762), the then existing courts of the District of Columbia, including the Circuit Court, were abolished, and that act created in their place the Supreme Court of the District of Columbia. By the first section that court was given "general jurisdiction in law and equity." By the third section it was provided that the court should "possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the Circuit Court of the District of Columbia."

When the Revised Statutes were prepared, the codifiers omitted the clause of this act giving to the Supreme Court of the District "general jurisdiction in law and equity," and they also changed the third section so as to make the provision above quoted read, "The Supreme Court shall possess the same powers and exercise the same jurisdiction as the Circuit Courts of the United States." (See Sec. 760, R. S. D. C.) It will be seen, however that under well-settled principles of construction this did not change the existing law, and that the powers and jurisdiction of the Circuit Courts of the United States referred to are such powers and jurisdiction as they existed on the 27th day of February, 1801.

Sec. 763 of the revision contains a provision, taken from the act of 1863, giving the justices of the Supreme Court of the District power to hold a criminal court.

When Congress, by the act of February 27, 1877 (19 Stat., 240) came to correct a number of errors which had crept into the Revised Statutes, they corrected, among other things, the error which the codifiers had made in regard to the jurisdiction of the Supreme Court of the District of Columbia. They did this by amending Sec. 763, so that it should read as follows:

"Said courts shall have cognizance of all crimes and offenses committed within said District, and of all cases in law and equity between parties, both or either of which shall be resident or be found within said District, and also of all actions or suits of a civil nature at common law or in equity in which the United States shall be plaintiffs or complainants, and of all seizures on land or water, and of all penalties or forfeitures made, arising or accruing under the laws of the United States," (19 Stat., 253, 254).

It is necessary only to read these laws to see the great mistake that was made by the Court of Appeals of New York in holding it to be apparent that the Supreme

Court of the District of Columbia and the Circuit Courts of the United States are placed upon the same footing and vested with the same jurisdiction and powers except as to the residence of parties. The Circuit Courts of the United States are created by Congress, and have no powers except those which are given them by those statutes. In the different States of the Union, the jurisdiction of most cases which arise, whether in law or in equity, is vested in the State courts. They are the depositaries of the general jurisdiction, in law and in equity, which came to us from the mother country. But the Supreme Court of the District of Columbia, save as to small civil suits which may be instituted before a justice of the peace, and minor criminal offenses which are tried in the Police Court, is the only court of original jurisdiction in the District, and in it are vested by the law of its creation the combined powers of the Federal and of the State Courts in their respective spheres. Its jurisdiction, therefore, is broader than that of any other court in the United States, State or Federal. (Kendall *v.* U. S., 12 Pet., 619, 620; U. S. *v.* Schurz, 102 U. S., 378. In both those cases it was held that the Supreme Court of the District had the power to issue a mandamus to the heads of the great departments of the Government—in the one case to the Postmaster-General, and in the other to the Secretary of the Interior. Yet this court has repeatedly held that the Circuit Courts of the United States have no power to issue a mandamus in any case whatever, except where the writ is to be used as ancillary to a suit already pending in the court. (McIntyre *v.* Wood, 7 Cranch., 504; Riggs *v.* Johnson County, 6 Wall., 166; Davenport *v.* Dodge County, 105 U. S., 237.)

Kendall *v.* U. S. and U. S. *v.* Schurz of themselves decide the proposition in the present case that a restriction imposed by law upon the Circuit Courts of the United

States does not affect the Supreme Court of the District of Columbia when exercising the powers conferred upon it as a court of general jurisdiction in law and in equity.

Therefore, if that portion of the act of 1831 which is now incorporated in Section 725 of the Revised Statutes is held to apply to the Supreme Court of the District of Columbia, it must be solely because of the provision of the act of 1871, sec. 93, R. S. D. C., making the laws of the United States which are not "locally inapplicable" in force in the District.

The act of February 21, 1871 (16 Stat., 419) provided a new form of government for the District. Theretofore the city had been governed by a mayor and a common council. This act gave it a governor, and a legislative assembly composed of a council and a house of delegates. Sec. 34 of that act (16 Stat., 426) provided for the election of members of the house of delegates, and at the end of that section there is added the following clause, which has no relevancy to the remainder of the section: "And the Constitution, and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States."

When we refer to the Constitution, we find that the provisions relating to the judicial power of the United States and to the courts in which that power shall be vested, are contained in Article III, but the provision under which the District of Columbia was created is not in that article but in Article I, relating to the legislative powers of the government, and it is simply that Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the site of the government of the United States, and to exercise like author-

ity over all territory purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings"; while the clause under which the territories are governed is to be found in that clause of Article IV, which gives to Congress in general terms the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

In American Ins. Co. *v.* Canter, 1 Pet., 511–546, Chief Justice Marshall, speaking for the court, said that a territorial court held by judges whose appointments are for four years can not be the depositary of any part of the judicial power conferred by the Constitution. "Such courts," he said, "are legislative courts created by virtue of the general right of sovereignty which exists in the government, or by virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. * * * In legislating for them Congress exercises the combined powers of the general and of the State government."

An act of Congress passed May 26th, 1864 (13 Stat., 91–88), providing a temporary government for the territory of Montana created certain courts in that territory, and gave to the Supreme and District Courts of the territory chancery, as well as common law jurisdiction. Sec. 13 of the act is as follows:

"The Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of Montana as elsewhere within the United States."

The territory being organized, its legislative assembly passed a "Civil practice act" providing, among other

things, that legal and equitable remedies should be blended in the same form of action. This court, having always held that legal and civil remedies must be kept distinct in those courts in which, by the Constitution, the judicial power of the government is vested, the question arose whether the territories were restricted in this way in establishing modes of procedure in their courts. It was held by this court, notwithstanding certain prior decisions of the court which were invoked to sustain the contention that the legislation in question was void, that the territorial legislatures were as free in this regard as the legislatures of the several States. The clause in the Montana act relating to the laws of the United States "not locally inapplicable" was pressed upon the court, but Mr. Justice Bradley, in delivering the opinion upon that question, said:

"But this proposition is not tenable. The laws regulating the proceedings of the United States courts are of specific application, and are in truth and in fact locally inapplicable to the courts of a territory. There is a law authorizing this court to appoint a reporter. In one sense this law is not locally inapplicable to the Supreme Court of the territory; but in a just sense it is so. The law has a specific application to this court, and can not be applied to the territorial court without an evident misconstruction of the true meaning and intent of Congress in the clause of the thirteenth section above referred to. That clause has the effect, undoubtedly, of importing into the territory the laws passed by Congress to prevent and punish offenses against the revenue, the mail service, and other laws of a general character and universal application; but not those of specific application.

"*The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the Federal system, and as invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in co-relation with the presence and jurisdiction of the several State courts and govern-*

ments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the Circuit and District Courts to follow the practice of the respective State courts in such cases at law, and that they supply no other rule in such cases, shows that they can not apply to the territorial Courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

"Whenever Congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any State legislature; and the jurisdiction of the territorial courts is collectively co-extensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the Circuit and the District Courts of the United States. In fine, the territorial, like the State courts, are invested with plenary municipal jurisdiction." Hornbuckle *v.* Toombs, 18 Wall., 648, 654, 656.

Now, the act of February 21, 1871, providing a government for the District of Columbia (16 Stat., 419), was as comprehensive in its provisions as the Montana act above referred to. It not only gave the District a governor and legislature, but it expressly provided (Sec. 25)

that the legislative assembly should have the power to pass laws to modify the practice of the court, and to confer such additional jurisdiction as might be necessary to the due execution and enforcement of the laws of the District; and by Section 18 it was provided that the legislative power of the District should "extend to all rightful subjects of legislation within said District." This section contained a proviso that the acts of the legislature should be subject to repeal or modification by Congress.

It seems to be impossible to distinguish between the case of Hornbuckle *v.* Toombs and the case at bar.

Reliance, however, is placed upon the case of Page *v.* Burnstine, 102 U. S., 664, in which it was held that Section 858 of the Revised Statutes, which provides that in actions by or against executors, etc., in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the decedent is in force in the District by virtue of the act of 1871 relating to the laws "not locally inapplicable." In that case this court distinguished it from Hornbuckle *v.* Toombs, and similar cases, in that it appeared in the latter cases that the legislatures of the territories in pursuance of power expressly conferred by Congress had enacted laws covering the same subjects to which the general statutes of the United States referred.

But it is submitted that Hornbuckle *v.* Toombs, and not Page *v.* Burnstine, governs the present case. In the former case the court holds that the expression "laws not locally inapplicable" referred to substantive law and not to procedure in the courts. Statutes regulating judicial procedure are, of couse, laws in one sense, but according to the decision in Hornbuckle *v.* Toombs, they are not included in the expression "laws not locally inapplicable" for the reason that there are no courts of the

United States in the proper sense except those in which the Constitution provides the judicial power of the Government shall be vested, so that acts of Congress regulating the procedure in the Federal courts proper can not be locally applicable where there are no such courts. "Such laws," said Mr. Justice Bradley in Hornbuckle *v.* Toombs, "were not intended as exertions of that plenary municipal authority which Congress has *over the District of Columbia* and the Territories." Again he says, "The jurisdiction of the territorial courts is collectively coextensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the Circuit and District courts of the United States. In fine, the territorial, like the State courts, are invested with plenary municipal jurisdiction." This observation, as we have seen, applies with much more force to the courts of the District of Columbia than to the courts of the Territories.

There are many other cases in this court in which the same distinction between the territorial courts and the Federal courts proper has been pointed out. In Benner *v.* Porter, 9 How., 235–242, this court said:

"The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.

"They are not organized under the Constitution, nor subject to its complex distribution of the powers of gov-

ernment, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether, or not, there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction."

In Clinton *v.* Engelbrecht, 13 Wall., 434–447, it was held that it was fatal error for a territorial court in Utah to follow the United States statutes in organizing a jury in a criminal case, the court observing that there is no District court of the United States in the territories in the sense of the Constitution.

In Reynolds *v.* U. S., 98 U. S., 145–154, it was held that Sec. 808 of the Revised Statutes relating to the organization of grand juries is not in force in the territories.

A most important case in this connection is McAllister *v.* U. S., 141 U. S., 174, in which the question was whether a judge of the District Court of Alaska was a judge of a court of the United States within the meaning of Section 1768, R. S., which authorizes the President to suspend any civil officer from office except "judges of the courts of the United States." This court in that case held that, although the District Court of Alaska was invested with the powers of a District Court and of a Circuit Court of the United States, as well as of all general jurisdiction to enforce in Alaska the laws of Oregon, that did not make it a court of the United States. Referring to Page *v.* Burnstine, *supra*, this court say that the conclusion reached, in that case, "was not because the courts of the District of Columbia were adjudged to be of the class in which the judicial power of the United Stateswas vested by the Constitution, but because all the acts relating to the competency of witnesses when construed together enacted that that section of the Revised Statutes applied to the courts

of the District of Columbia." It was further urged upon the court that there was the same reason for requiring the independence of judges in the territories by giving to them a stable tenure of office which applied to judges of the Federal courts proper, but to this it was replied:

"We cannot ignore the fact that while the Constitution has in respect to judges of courts in which may be vested the judicial power of the United States, secured their independence by an express provision that they may hold their offices during good behavior and receive at stated times a compensation for their services, that can not be diminished during their continuance in office, no such guaranties are provided by that instrument in respect of judges of courts created by or under the authority of Congress for a territory of the United States. The absence from the Constitution of such guaranties for territorial judges was no doubt due to the fact that the organization of governments for the territories was but temporary and would be superseded when the territories became States of the Union" (pages 187, 188).

Following these decisions the Supreme Court of Montana has expressly decided that Section 725 of the Revised Statutes does not apply to the courts of that territory.

Terry *v.* Murphy, 15 Pac. Rep., 149.

It is claimed, however, by counsel for the defendants in error that the case of Embry *v.* Palmer, 107 U.S., 3, 9, 10, is adverse to our contention on this subject. That case was as follows:

Sec. 709, R.S., gives this court the right to review judgments of State courts where is drawn in question "an authority exercised under the United States." In Dupasseur *v.* Rocheau, 21 Wall, 130, it was held that such a question was raised when a State court refuses to give due effect to the judgment "of a court of the United States." In Embry *v.* Palmer, the question was whether Sec. 709 gave this court the right to review the judgment of a State court refusing to give due credit and

effect to a judgment of the Supreme Court of the District of Columbia, and it was held "that the Supreme Court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress." But the question is, in what sense were the words "court of the United States" used in Embry *v.* Palmer? Any court which exists by virtue of an act of Congress is a court of the United States in a certain sense. But in the same sense the territorial courts are courts of the United States, inasmuch as they, too, are created by Congress, and the judges thereof are appointed by the President and confirmed by the Senate. They act under the authority of the United States, and their judgments are entitled to respect under Section 709, but that does not affect the present question, which is whether statutes relating to Federal courts proper embrace the courts of the territories and of the District of Columbia.

In *Ex parte* Norvell, 20 D. C., 348, the Supreme Court of the District, referring to Embry *v.* Palmer, said that if there was any doubt whether it was a court of the United States, that decision had settled it, and that case is relied upon as an authority here. So, it appears that in December, 1831, the Circuit Court of the District of Columbia in U. S. *v.* Emerson, 4 Cr. C. Ct., 188, assumed that the act of March 2, 1831, limiting the power "of the several courts of the United States" in contempt proceedings applied to it. This was forty years before Congress had declared that the laws of the United States "not locally inapplicable" should be enforced in the District, so that it is plain that the Circuit Court took it for granted that it was one of the courts of the United States referred to in the statute. No doubt the judges of the former Circuit Court of the District and of the existing Supreme Court of the District have always considered that they

are under the protection of Section 1 of Article III of the Constitution relating to the tenure of office and the compensation of the Federal judiciary. But for many years there has been in existence in the District another court exercising criminal jurisdiction of considerable importance, the judges of which have held office for a term of only six years (Rev. Stat., D. C., Sections 1041, 1042, etc.). If that court is a constitutional one, then, clearly the District courts are not "courts of the United States" in the sense now under consideration. This question has been before this court, but was not decided. One James C. Callan, having been convicted with others in the Police Court of the District of Columbia of criminal conspiracy and sentenced to pay a fine of $25 and to be imprisoned in default of payment for the period of thirty days, sued out a writ of *habeas corpus*. He claimed to be discharged upon the ground, among others, that the judge of the Police Court of the District was appointed under a law which fixed his tenure of office at a period of six years. (Sec. 1042, R. S. D. C.) The case came here, and that question was submitted and argued, counsel for Callan, in his brief, laying particular stress upon the point that a law providing for the appointment of a judge of a court of the United States for a term of years only was void. This court discharged Callan, because the Police Court was an unconstitutional court, in that it had no jury, but it said nothing upon the other question, and the report of the case does not even show that it was raised (Callan *v.* Wilson, 127 U. S., 540).

It is apparent that the precise relations which the courts of the District of Columbia bear to the Federal judicial system have never yet been authoritatively determined. We submit in the first place, that the weight of reasoning and authority, so far as this court has spoken upon the subject at all, is in favor of our contention, that the courts

of the District of Columbia, like the territorial courts, are not to be held to be affected by statutory provisions relating to procedure in the "courts of the United States." And in the second place, that whether we are right in this or not, the question is of such a nature that the action of the courts of the District of Columbia in a case properly before those courts, which may be based either upon one view of this question or the other, is binding in other jurisdictions until properly brought to this court for review and here reversed.

III

When McDonald refused to comply with the order of the Supreme Court of the District of Columbia, directing him to pay into the registry of the court the fund in controversy, and fled from the District of Columbia, it was competent for that court, in the exercise of its general powers as a court of chancery, to strike out the defendant's answer, enter a decree pro confesso and refuse to hear him on the merits of the case, so long as he continued to disregard the order of the court.

On this proposition we are in accord with the Court of Appeals of New York. That court held that the Supreme Court of the District of Columbia was bound by Section 725 of the Revised Statutes, and that by that section its power in the premises was limited to the imposition of a fine and the infliction of imprisonment. If that court had held that Section 725 does not apply to the Supreme Court of the District it would have held that the general powers vested in that court as a Court of Equity gave it the right to pursue the course which it did in fact follow, for the Court of Appeals in a carefully prepared opinion has decided that when a defendant has refused to comply with an order of the court as to the payment of

money, and has gone without the jurisdiction of the court, so that it can not reach his person, it has the power to strike out his answer and proceed against him as though he were in default. This decision was rendered in Walker *v.* Walker, 82 N. Y., 260. The opinion in full of the court is as follows:

"Folger, Ch. J. The defendant, having refused or neglected to obey an important order of the court, was in contempt, and liable to punishment by reason thereof. The punishment inflicted by the court was by an order made in the cause, to strike out the answer that had been put in by him, and to direct a reference to take proof of the matters stated in the order; the reference to proceed as if there had been no answer put in.

"It is claimed that the court had no power to make that order; that every defendant has a vested right to make a defense to any action or suit or legal proceeding begun against him, and that he can not be deprived of it.

"It is conceded by the defendant that the Supreme Court, on its equity side, has all the power and authority that formerly existed in Chancery in England and was continuously exercised by it. 'The rule there must be the rule here,' says Chancellor Kent, 'for I take this occasion to observe, that I consider myself bound by those principles which were known and established as law in the Courts of Equity in England at the time of the institution of this court.' (Manning *v.* Manning, 1 Johns, Ch. 527–9.) It is not to be denied that a Court of Equity may refuse to a defendant in contempt, the benefit of proceedings in it, when asked by him as a favor, until he has purged himself of his contempt. (See Brinkley *v.* Brinkley, 47 N. Y., 40–9, and cases there cited.) But the rule has been held broader than that and enforced with much rigor. Chief Baron Gilbert lays it down in his *Forum Romanorum* (p. 33), that 'if the defendant appeared before the *secundum decretum*, he was liable to a mulct, for he could not be heard in the cause till he had cleared his contempt.' * * * It is suggested in Cooper's Cases (temp. Cott., 209), that this is

merely a statement of the practice according to the canon law. But the Chief Baron says at another place (p. 71) that 'the answer will not be received without clearing his contempt'; and at another (p. 211): 'So it is where a man hath a bill depending in court and falls under the displeasure of the court, and is ordered to stand committed. Here, when his cause is called, if the other side insist he hath not cleared his contempt, nor actually surrendered his body to the warden of the *Fleet*, he must do both these things before his cause can be proceeded in. * * * It is stated by Lord Eldon, that it is a general rule that a party who has not cleared his contempt can not be heard. Vowles *v.* Young, 9 Ves., Jr., 173; Anonymous, 15 *Id.*, 174. The same is said, with the addition of the words 'in the principal case,' in 2 Com. Dig. Chancery Process, D. 8, citing Practical Register in Chancery, 217. See, also, Heyn *v.* Heyn, Jacobs, 49; Clark *v.* Dew, 1 Russ. & Myl., 103. The rule in the Chancery of Ireland is stated thus: A party in contempt will not be allowed to oppose the relief sought by the plaintiff by contradicting the allegations of the bill, or bringing forward any defense, or alleging new facts. Anon *v.* Lord Gort, 1 Hogan, 77; Valle *v.* O'Reilly, *Id.*, 199. And the rule, as thus stated, is cited and approved in Mussina *v.* Bartlett, 8 Porter [17 Ala.], 277. See, also, Rutherford *v.* Metcalf, 3 Hayw. [Tenn.], 58, 61. And in Saylor *v.* Mockbie, 1 Withrow [9 Iowa], 209, 212, it is held: That until the defendant had purged himself of contempt, the court might well refuse to receive his answer to the complainant's bill, or to consider the matter set up in it by way of excuse for refusal to obey the order. The Reporter (Coop. temp. Cott, at page 211), cites in a note the case of *v.* Lord Gort (*supra*), and says of it: 'The accuracy of some of these *dicta* may be doubted.' He does not state as to which of them he queries. Many cases are collected in the note just above mentioned; some of them show that the rule has not been rigorously applied in later times (see King *v.* Bryant, 3 Myl. & Cr., 191 especially), but it does not appear that it has been abolished or abandoned entirely. It seems, too, that the authors of the Revised Statutes thought that this power resided

in the English Court of Chancery. In preparing the sections relative to the production and discovery of books and papers (2 R. S., 199, see §§ 21 *et seq.*) they provided (§ 26), that in case of a party neglecting or refusing to obey an order, the court might strike out his plea and debar him from a defense; and they sought thus to assimilate the practice to that of the Court of Chancery. See reviser's note, 5 Edm. Stat., 411. The legislature gave its sanction to the proposed practice by passing into law the sections reported by the reviser. It is well to say here that Rice *v.* Ehle (55 N. Y., 518) does not condemn this. That case holds that the pleading may not be stricken out, save on notice to the party (p. 523); and that the exercise of this power was legitimate was recognized by Marcy, J., in Birdsall *v.* Pixley, 4 Wend., 196. The power seems to have been exerted or recognized by the Supreme Court in several instances, without question made by appeal. Farnham *v.* Farnham, 9 How. Pr., 231; Barker *v.* Barker, 15 *Id.*, 568; Ford *v.* Ford, 41 *Id.*, 169.

"We are brought to the conclusion that there has long been exerted by the Court of Chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the Courts of Chancery of this country.

"We do not think that the cases of Wayland *v.* Tysen (45 N. Y., 282), and Thompson *v.* Erie Railway (*id.* 471) and others of like result, are in the way of this conclusion. They were not cases of contempt, nor were they equity cases. Besides, there the answer was stricken out, with no loophole left for relief to the defendant. It is always in the power of the defendant, in a case like this in hand, to apply to the court and show that the order was irregularly made, or for leave to purge himself of the contempt and be let in again to make his defense; Brinkley *v.* Brinkley, *supra.*

"The order should be affirmed.

"All concur.

"Order affirmed."

In a later case in New York in a suit for absolute divorce, the answer of the defendant was struck out by the

Supreme Court in Special Term, because he had failed to pay alimony as directed by the court and had left the State. Thereupon the case went to a final decree against the defendant. Afterwards he returned, and at his instance the Court in Special Term set aside the final decree against him, and allowed him to come in and reopen the case. But the Court in General Term reversed this order because he was still in contempt. (Quigley *v.* Quigley, 45 Hun., 23.)

Notwithstanding that the law is thus settled in New York by the court of last resort in that State, that under its general powers a court of chancery may strike out the answer of a defendant, who is in contempt, and proceed in the case, without giving him a hearing on the merits, counsel for the defendants in error here contend that this is not the law. It would be singular, indeed, if that court should be required to hold void for such a reason a decree made by a court of another jurisdiction, having general equity powers, while it sustains similar decrees made by the courts of New York because they have general equity powers. The Court of Appeals of New York is required to give to the decree of the Supreme Court of the District the same effect it would have in the District. The Supreme Court of the District decides that a court of chancery not restricted by statute may strike out a defendant's answer for his failure to obey a lawful order of the court in the case. The Court of Appeals of New York holds the same doctrine. This court is to decide not what it would do if the case had come before it on appeal, but what effect the courts of New York were bound to give to this decree when it was presented to them. It would seem to follow that as the courts of the two jurisdictions concerned agree about the matter, the decree so far as this point is concerned must be respected.

Counsel for the defendants in error assume that when McDonald's answer was struck out it left the case in the same situation that it would have been in if he had never appeared. In other words, they say that the effect of striking out the answer was to deprive him of any right to futher defend the case. If this were so, it would not, in our judgment, alter the case; but it is not, we submit, an accurate statement of the law. In this contention, adverse counsel rely upon Fuller v. Claflin, 93 U. S., 14. That was an action at law, however. An "answer" was filed which the court required to be made more specific in certain particulars. In obedience to this order a further answer was filed, which the court struck out as not being in compliance with the order, and at once entered judgment for the amount of the promissory notes sued on. This court, in reviewing the case, *not collaterally, but on writ of error*, held that striking out the answer under the circumstances of that case was "not a mere procedure in the cause. It is the ending of the cause, leaving the action undefended, and with a right to immediate judgment. Accordingly, we find in this case, that the same order * * * which directed the amended answer to be struck out * * * contained a final judgment for the amount of the notes described, with interest and costs, and directed that execution issue therefor. Such an order has often been held to be appealable." It was then further held that the answer was sufficiently specific, and the judgment was reversed.

But in a court of equity, when a defendant fails to file an answer, or, when having filed one, the court strikes it out, the complainant is not entitled as of course to any relief. A decree *pro confesso* is first taken against the defendant, and when in due time the case comes on for final hearing on the bill and the decree *pro confesso*, the court must determine what relief, if any, should be

granted. Thus, in Thomson *v.* Wooster, 114 U. S., 104, 111, the nature of decrees *pro confesso* in equity was considered, the court saying:

"For at least two centuries past bills have been taken *pro confesso* for contumacy * * * It is thus seen that by our practice, a decree *pro confesso* is not a decree as of course according to the prayer of the bill, not merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true. This gives it the greater solemnity, and accords with the English practice, as well as that of New York. Chancellor Kent, quoting Lord Eldon, says: 'Where the bill is thus taken *pro confesso*, and the cause is set down for hearing, the course (says Lord Eldon, in Geary *v.* Sheridan, 8 Ves. 192) is for the court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendant at the hearing.' Rose *v.* Woodruff, 4 Johns. Ch., 547, 548."

The harsh practice of the English Courts of Chancery in compelling a defendant to answer the bill or comply with some other order of the court by imprisoning the offending party until he obeyed the court's decree was mitigated in Maryland prior to the cession of the District of Columbia to the United States by several statutes which authorized the court in particular cases to enter a decree *pro confesso* against the defendant instead of sending him to prison. Thus, by the Maryland act of 1785, Ch. 72, Sec. 19 (Abert's Comp., 86, Sec. 38), the court was authorized to enter a decree *pro confesso* for want of an answer. Sec. 20 of the same act (Abert's Comp., 86, Sec. 39) further provides that a defendant failing to file his answer in due season "shall be in contempt, and the plaintiff shall and may upon motion have an attachment of

contempt against him." The act goes on to provide that eventually a decree *pro confesso* may be taken, and that such decree may be made thereupon as by the court may be thought just.

The Maryland act of 1799, Ch. 79, Sec. 2 (Abert's Comp., 102, Sec. 88), authorizes a decree *pro confesso* for failure of the defendant to answer interrogatories propounded to him in the bill.

The English and Maryland statutes authorizing decrees *pro confesso* under various circumstances, were reviewed by the Chancellor of Maryland in Neale *v.* Hagthrop, 3 Bland, Ch., 551–574. It was shown that these statutes provide for all the cases that have, or, as it is supposed, can, occur. No one of these statutes, however, in terms covered the case which was then before the court, which was the failure of the defendant to answer a part only of the bill. The Chancellor held that while the letter of the statutes did not cover such a case, their spirit did, and ordered that that part of the bill which was not answered should be taken as confessed.

In most of the cases in which the courts of equity in this country have undertaken to coerce a party into compliance with an order of the court made for the benefit of the adverse party, the offender has been before the court, or at least within the jurisdiction, where he could be reached. In such cases the ordinary remedy, as we have seen, is to issue an attachment and detain him in custody thereunder until he complies with the order of the court. But when he goes out of the jurisdiction and remains absent, that remedy can not be pursued. It is indeed suggested by counsel for the defendants in error that contempt of court is a criminal offense for which the offender may be indicted in the jurisdiction where his offense was com-

mitted, and that after being indicted he may be reached outside of the jurisdiction and brought back to stand his trial. But there are three replies to this suggestion. In the first place the offender may go out of the country and no extradition treaty, it is believed, applies to such a fugitive. In the second place the failure to comply with *such* an order is not a criminal offense. Lastly this theory requires the judicial department of the Government to abandon any attempt to vindicate its own authority. The first of these replies needs no elaboration. As to the second, we have already shown by a multitude of authorities, including Worden *v.* Searles, 121 U. S., 14, that to constitute a criminal offense in these cases there must be something more than the mere failure to comply with an order which is in the nature of an execution for the benefit of the other party. That for violation of an order of this kind the offender can not be reached in another jurisdiction was, as we have seen, expressly decided in Graves' Case, 29 Fed. Rep., 60. As to the remaining point, it is clear that so far as the court itself is concerned it will be without any remedy whatever. The district attorney might or might not prosecute the case; the grand jury might or might not find an indictment; and if a conviction should be obtained the President might immediately pardon the offender. In the meantime the case would have to go on. The court whose process had been defied by a defendant would have to hear his counsel and give to him the same consideration which would be due to any other suitor. In this very case, for instance, if the position taken by counsel for defendants in error be correct, the Supreme Court of the District of Columbia being unable to reach the defendants so as to exercise any actual coercion upon them, would have been compelled to hear and determine the case just as it would have done had McDonald complied with its order and paid the fund in

controversy into the registry of the court. It is believed that counsel will be unable to find any case in which such a course has been pursued. Where the offender is the plaintiff in the action the remedy is easy, because he is asking for affirmative relief, and it is admitted on all hands that in such a case the court may refuse to hear him; but where he is the defendant in the suit and stays out of the jurisdiction himself while he undertakes to defend the case through his counsel, there is absolutely no remedy except to refuse to hear him. No reason is apparent why the defendant should be entitled to be heard under such circumstances which would not apply to the plaintiff. The mere fact that the latter seeks affirmative relief while the other opposes it furnishes no ground for such a distinction. The Constitution and the laws give the plaintiff the same right to be heard that they give to the defendant, and the denial of the right to be heard is as injurious to the one as to the other. And when it is observed that in this case that when McDonald and White filed what is called their answer, they asked "in the nature of a cross-petition" that the contract which constituted the plaintiff's cause of action should be declared void and be delivered up to the court to be cancelled, and that the complainants might be enjoined from seeking to enforce it in any other suit or proceeding, and that the defendants might have "such further and other relief in the premises as the nature of the case requires" (49), and when it is observed further that McDonald and White filed a formal answer to this cross-bill ("Defendants' Exhibit No. 1," p. 28), any supposed difference between the two parties on the ground that only one of them was asking for affirmative relief disappears entirely from the case.

The question here presented has already been passed upon by this court. When the Supreme Court of the

District of Columbia in General Term refused to charge the receiver, on the ground that he was protected by the order of the Court in Special Term, which directed him to pay the fund over to McDonald, Hovey and Dole appealed to this court. When the case got here, the counsel for Mr. Riggs moved the court to dismiss the appeal; first, because the receiver was not a party to the suit, and therefore not bound by the final decree of April 17, 1878; and second, upon the ground "*That the said decree of April 17, 1878, rendered by the Supreme Court of the District of Columbia, was void, because the said court had no power to strike out the answer of McDonald and White for contempt.*"

This motion was heard when the case came on to be heard on the merits. Both in the briefs of counsel, and in the oral argument (as we are advised), the counsel for the receiver strongly urged upon this court the second ground upon which the motion was based. But in delivering the opinion of the court, Mr. Justice Bradley, after holding that the receiver was a party to the suit, proceeds at once to consider the merits of the case, without referring at all to the other ground upon which the motion to dismiss was based. (Hovey *v.* McDonald, 109 U. S., 155, 156). As the very foundation of the claim against the receiver in that case, as in the present case, was that the lien of the complainants has been established by the final decree of April 17, 1878, it is manifest that it was impossible for the court to reach the merits of the case without disposing of that question. Under such circumstances, although nothing was said about the matter in the opinion, it must, we submit, hold to be an adjudication by this court that that decree was valid as against McDonald.

In the case of Gilman *v.* Philadelphia, 3 Wall., 713, 729, this court said, in referring to a similar omission in an opinion delivered by Chief Justice Marshall in Wil-

son *v.* The Black-bird Creek Marsh Company, 2 Pet., 250:

"The point that the vessel was enrolled and licensed for the coasting trade was relied upon in that case by the counsel for the defendant. The court was silent upon the subject. A distinct denial of its materiality would not have been more significant. It seems to have been deemed of too little consequence to require notice. Without overruling the authority of that adjudication, we can not, by our judgment, annul the law of Pennsylvania."

Again in Laird *v.* City of De Soto, 32 Fed. Rep., 654, it appeared that the question of the validity of certain bonds had been presented in the brief of counsel in another case, but had not been formally passed upon, or even referred to, in the decision of the court in that case, and in the opinion (which was delivered by Mr. Justice Brewer) the court, referring to this said: "There can be no escape from the conclusion that this very question was presented, and necessarily decided, and, of course, under the authorities, that matter is *res adjudicata.*

We do not contend in the present case that the decision of this question by this court in Hovey *v.* McDonald, 109 U. S., 150, is to be considered as rendering the question *res adjudicata* in this case. Riggs and Company had purchased the bonds from Mr. Riggs, before the proceeding against the latter as receiver was instituted, so that technically they were not a party to that proceeding. But, we submit, that the opinion of this court in the case in 109 U. S., although expressed by its silence only, was entitled to more weight and should have received more consideration than were given to it by the Court of Appeals of New York in the present case. That it was brought to the notice of that court will not be disputed, and the fact clearly appears in the Record, because one of the referee's findings of fact was as follows:

"Twenty-seventh. That the counsel for the executor of said George W. Riggs, receiver, moved to dismiss the said appeal to the Supreme Court of the United States, upon the ground, among others, that the said decree of April 17, 1878, rendered by the said Supreme Court of the District of Columbia, in the case of Hovey *et al. v.* McDonald *et al.*, was void, *because said court had no power to strike out the answer of McDonald and White for contempt.* That the said motion to dismiss was denied by the said Supreme Court of the United States." (Record, 76).

And even if the motion to dismiss had not been made, this question was necessarily involved in considering the merits of the case against the receiver. The failure of this court to even refer to the point in that connection is very significant.

The Superior Court of New York itself held in an action brought by Hovey and Dole against McDonald that the decree of April 17, 1878, was not void and a judgment against McDonald was sustained accordingly. (Hovey *v.* McDonald, 45 N. Y., Super. Ct., 606.) The same court held the contrary in the present suit without taking any note of its former decision.

A striking illustration of the right of a court under circumstances analogous to those of the case at bar to vindicate its dignity and authority by refusing to hear a party is afforded by that somewhat numerous class of cases in which a defendant who has been convicted in a criminal court escapes from prison while the judgment against him is under review in a higher court. There is no Federal statute which applies to such a case as this; yet under such circumstances this court has twice refused to consider such a case, and ordered it off the docket until directions to the contrary (Smith *v.* U. S., 94 U. S., 97; Bonahan *v.* Nebraska, 125 U. S., 692). And in the case

of Thomas Allen, Plaintiff in Error, *v.* The State of Georgia, decided at the present term of the court, it was held that under such circumstances the appeal or writ of error may be dismissed. In that case a prisoner who had been convicted and sentenced to death by the Superior Court in Bibb County in Georgia, escaped from jail and became a fugitive from justice while his case was pending on writ of error in the Supreme Court of the State, and because of that fact his writ of error was dismissed. Afterwards, having been recaptured and resentenced to death, he brought the case here on a writ of error upon the ground that the dismissal of his writ of error was a denial of due process of law. But this court affirmed the order in the Supreme Court of Georgia, dismissing the writ of error to that court, this court saying:

"We can not say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody, he has, by the laws of most if not all the States, committed a distinct criminal offense; and it seems but a light punishment for such an offense to hold that he has thereby abandoned his right to prosecute a writ of error sued out to review his conviction. Otherwise he is put in a position of saying to the court:

"'Sustain my writ, and I will surrender myself and take my chances upon a second trial; deny me a new trial, and I will leave the State or forever remain in hiding.'

"We consider this as practically a declaration of the terms upon which he is willing to surrender himself, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that a court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody."

Many cases in the State courts are cited in the opinion in support of this decision, including the case of Genet, 59 N. Y., 80, in which the defendant escaped pending the settlement of a bill of exceptions, and the court declining to proceed with the settlement of the bill, the case was carried to the Court of Appeals of New York, where the action of the court below was affirmed.

The ground of these decisions is, that the prisoner in such cases by running away waives his right to be heard. If such a right can be waived by one who has been condemned to the penitentiary or sentenced to death, may it not be waived by one who has in his possession a fund upon which another seeks to establish a lien, and which the court in which the case is pending has directed him to deliver up to it? If the case against McDonald had proceeded in regular course, notwithstanding his contempt, he would have been in a situation where he could have held on to the fund in controversy whether the court decided in his favor or against him. It is respectfully submitted that no court is required to accept the invitation of a party to play with him such a game of "Heads I win, tails you lose."

IV.

The final decree against McDonald and White made by the Supreme Court of the District of Columbia in General Term on the 17th day of April, 1878, even if erroneous in the respects claimed, was not void, and was not subject to collateral attack in the Courts of the State of New York.

The general rule established by numerous decisions of this court is that when a court has jurisdiction of the parties and the subject-matter and the decree or judgment which it enters is one which it might under any circumstances make in the cause, such decree or judgment (ex-

cept when duly taken for review to an appellate court) is binding between the parties and their privies in all other judicial tribunals. The Court of Appeals of New York, while recognizing this general rule, held that the present case comes within certain exceptions to it. In reaching this conclusion that court in its opinion relies mainly upon certain decisions of this court (136, 137).

Having held that Section 725 of the Revised Statutes of the United States applies to the Supreme Court of the District of Columbia, and that that section restricts to fine or imprisonment punishments for contempt, the court below decides, in effect, that although the Supreme Court of the District had jurisdiction of the parties and of the subject-matter, and had these questions presented to *it* for determination, yet if it decided them erroneously, its decree, based upon such erroneous conclusion, is absolutely void. We proceed to consider the principal decisions of this court involving the doctrine of collateral attack upon a judgment or decree to ascertain whether they warrant this conclusion.

In an early case in this court the question was whether the judgment of a court of Common Pleas in Ohio confirming a sale of real estate could be assailed collaterally on the ground that in the proceedings certain statutory conditions precedent to the sale had not been complied with. In a long and able opinion delivered by Mr. Justice Baldwin it was held that it must be conclusively presumed that all such conditions had been complied with.

"Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged * * * If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity."

Voorhees *v.* Bank, 10 Pet., 449–472, 473.

In another somewhat similar case this court said:

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet., 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court, which rendered it, have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law."

Grignon's Lessee *v.* Astor, 2 How., 340.

This case is approved and followed in Gray *v.* Brignardello, 1 Wall., 634, Thaw *v.* Ritchie, 136 U. S., 519–547, Sargeant *v.* Bank, 12 How., 371, and in McNitt *v.* Turner, 16 Wall., 356–362.

In another case involving title to real estate in Louisiana which had been sold by the local courts in administration proceedings, this court says:

"It is the settled doctrine of this court that when the proceedings of a court of justice are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within its jurisdiction, they can not be impeached for error or irregularity." Beauregard *v.* New Orleans, 18 How., 502, 503.

So, in regard to the sale of a decedent's real estate through proceedings in a probate court in Wisconsin,

this court held that in such cases the only thing necessary to give jurisdiction is a representation to the court of the insufficiency of the personal assets. "The sufficiency of the proof upon which the court based its action is not a matter open to consideration in a collateral manner; it does not touch the question of jurisdiction." Comstock *v.* Crawford, 3 Wall., 396–406.

In another case of the same kind, which originated in Illinois, judgment confirming a sale of real estate was sustained against collateral assault, it being held that the court must be presumed to have adjudged every necessary jurisdictional question, such as the death of the owner; that the petitioners were his administrators; that the personal estate was insufficient to pay the debts of the deceased, and that all the provisions of the law as to notices had been complied with—the purchasers under such a sale not being bound to look further back than the order of the court. Florentine *v.* Barton, 2 Wall., 210–216.

In another case in which a decedent's real estate had been sold to pay his debts, the statute under which the proceeding was conducted required that the debtor's claim should first be approved by the judge. The record in the case did not show that any such proof had been given. But it was held that this did not open the judgment to collateral assault—that it would be conclusively presumed that the judge had approved the claim before he authorized the land to be sold in satisfaction of it. Cornett *v.* Williams, 20 Wall., 226–249, 250.

In Applegate *v.* Mining Company, 117 U. S., 255, 269, 271, it was attempted to assail collaterally a decree foreclosing a mortgage, on the ground that the record did not show that the constructive notice by publication, which the statute required, and which the court had ordered, had ever been given, but it was held that it must

be presumed in favor of the jurisdiction that service was made as ordered.

The title to the proceeds of certain land in Wisconsin was involved in a suit brought in the Federal courts in Pennsylvania. The complainants claimed as heirs of one Simmons, who had died domiciled in Louisiana. The defendant claimed under an order of a parish court in Louisiana appointing an administrator of Simmons's estate and directing the administrator to sell certain land script which the purchaser had located on the lands in Wisconsin. The proceedings of the Louisiana court were assailed in the bill for want of jurisdiction and for fraud.

On demurrer the bill was dismissed, this court holding that the jurisdiction of the Louisiana court having attached, its proceedings could not be assailed collaterally, either on the ground that the notice to the heirs required by the statute had not been published or on the ground that it had been procured by fraud.

Simmons *v.* Saul, 138 U. S., 439, 453, 458.

This court in several other cases has held that the decree of a State court can not be assailed collaterally in the Federal courts on the ground that it was obtained by fraud.

Randall *v.* ~~Black~~ Howard, 2 Black., 585;
Nougue *v.* Clapp, 101 U. S., 551;
Graham *v.* Boston, etc., R. Co., 118 U. S., 161, 177, 178.

In Cooper *v.* Reynolds, 10 Wall., 308–319, it was held that in foreign attachment proceedings the jurisdiction of the court depends solely upon the seizure of the *rem*, and that if the statute governing the proceedings be disregarded as to the contents of the affidavit, the time of the issuing of the attachment, and as to giving

notice by publication, the judgment will stand against collateral assault.

It is the settled doctrine of this court that when a Circuit Court of the United States has heard and determined a cause in which its jurisdiction depends upon the diverse citizenship of the parties, its judgment can not be assailed collaterally because such diverse citizenship does not appear upon the record. The judgment is conclusive, whatever may be the *fact* as to the citizenship of the parties.

McCormick *v.* Sullivant, 10 Wheat., 189;
Evers *v.* Watson, 156 U. S., 527;
Cutler *v.* Huston, 158 U. S., 430.

So far does this doctrine go, that when, after a case had been determined in this court on appeal, and remanded to the court below for further proceedings, it was discovered that the jurisdictional facts did not appear in the case, this court on a certificate of a division of opinion from the judges below, held that it was too late to raise the question of jurisdiction.

Skillern's Executors *v.* May's executors, 6 Cranch, 267.

Section 723 of the Revised Statutes of the United States forbids the Federal Courts to entertain suits in equity when there is a plain remedy at law, yet if a Federal Court erroneously entertains a case within the prohibited class, its determination is binding upon the parties. The judgment is not void.

Mellen *v.* Moline Iron Works, 131 U. S., 367.

When a case was removed from a State Court in Iowa to a Federal Court by citizens of another State, and the Circuit Court erroneously decided a controversy between

two citizens of Iowa, it was held that the final judgment in the suit was not assailable collaterally.

"Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed on appeal as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part, or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise, and the rightful exercise, of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right in this or any other respect was to be finally determined by this court on appeal."

DesMoines Navigation Co. *v.* Iowa Homestead Co., 123 U. S., 552–559.

In another case, the Supreme Court of the State of Oregon had held void a decree of the United States Circuit Court for the District of Oregon on the ground that the Circuit Court had proceeded without jurisdiction. This court refused to enter upon a consideration of the question whether, as a matter of fact, the Circuit Court did err in assuming or retaining jurisdiction. After reviewing the prior cases in this court on that question, Mr. Justice Harlan says:

"These authorities above cited, it is said, do not apply to the present case because the ground on which it is claimed the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circut Court of the United States was competent to determine in the first instance. Its determination

was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it and could not be questioned by them, or either of them, collaterally or otherwise than on a writ of error or appeal to this court."

Dowell *v.* ~~Black~~ Applegate, 152 U. S., 327–337–340.

In a case which originated in the District of Columbia proceedings for the partition of real estate were sustained against a collateral attack, notwithstanding several departures by the court from the terms of the Maryland statute under which the proceedings were held. The court said, (quoting from Elliott *v.* Piersol, 1 Pet., 340):

"When a court has jurisdiction it has a right to decide every question that occurs in the cause, and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court."

Thompson *v.* Tolmie, 2 Pet., 157.

After final judgment in an ejectment case, the court, without notice to the defendant, allowed the declaration to be amended by extending the term of the fictitious lease sued on, so as to make the judgment an adjudication as to the plaintiff's rights during his real term, instead of under the shorter term set forth in the fictitious lease. This court sustained this action against collateral assault, holding that the rule which requires service of process or notice to give a court jurisdiction in a personal action in the first instance has no application to the "decision of a collateral question in a case where the parties are before the court."

Walden's Lessee *v.* Craig's Heirs, 14 Pet., 147–154.

In the case of Florentine *v.* Barton, 2 Wall., 210–216, (which has been more fully referred to above) this court say:

"The court having a right to decide every question which occurs in the cause, whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court."

A corporation in Louisiana undertook to make a *cessio bonorum* for the benefit of its creditors. A judge of a State court accepted this act and enjoined the owner of certain premises from asserting his landlord's lien within the time in which the laws of the State required it to be filed to make it effectual.

It was held that a corporation was not "a person" within the law regulating such assignments, but that nevertheless the injunction was binding until it was vacated.

"This vacation of the original order, and setting aside the proceedings had under it, does not, of itself, afford an answer to the question whether the proceedings were absolutely void or only voidable. Proceedings are often set aside for mere irregularities. The judge who accepted the cession had jurisdiction of the subject-matter, and the parties were before him. The order accepting the cession contained an inhibition that all judicial proceedings against the property of the company should be stayed. The defect in the proceedings was, that the corporation was not such a person as was entitled to the benefit of the law. Could such an order be disregarded so long as it was not vacated or reversed? Was it not the duty of the lessors to respect it? How could they safely issue a writ of provisional seizure when there was an express inhibition of all judicial proceedings against the property in a proceeding to which they were parties? The order of the judge accepting the cession, and inhibiting judicial proceedings, was a judicial act. In making it he had to decide on the question of his own jurisdiction over the subject-matter and the parties; and although his decision may have been wrong, acts done in pursuance of it were binding until they were reversed or set aside. * * * Under these circum-

stances it hardly lies in the mouths of the defendants to say that the lessors ought to have disobeyed the order of the judge, and disregarded all the subsequent proceedings before they were reversed; and that they should have met the court with the issue of the strong hand."

Holdane *v.* Sumner, 15 Wall., 608–609.

A court martial was reconvened after sentence, because the punishment was too mild, and it thereupon inflicted a severer punishment. On petition for a writ of *habeas corpus* it was held that the court-martial had jurisdiction, and that its judgment, within its jurisdiction, was as unassailable collaterally as that of any other court.

"Whatever was done that the court could do under any circumstances, we must presume was properly done."

Ex parte Reed, 100 U. S., 13–23.

At common law no action lies by the representatives of a deceased person against one whose negligence has caused his death. In many jurisdictions such a right of action is given, however, by statute. In a suit brought in the Supreme Court of the United States for the Western District of Arkansas the question was, whether such a statute was in force in the Indian Territory. This court, in reviewing the case, held that whether there was or was not such a statute in force in that Territory was not a matter which affected the jurisdiction of the court; that since it had jurisdiction of the parties, it has the right to determine that question, and that its decision, whether erroneous or not, could not, therefore, be reviewed by this court, which, in the examination of the record, was confined to questions going to the jurisdiction of the court below.

St. Louis, Etc., Railway Co. *v.* McBride, 141 U. S., 127–130.

Fourteen indictments for embezzlement were found against a defendant in the Supreme Court of the District of Columbia. By order of the court these indictments were consolidated and a jury was empaneled in the consolidated case. After the District Attorney had made his opening statement of the case to the jury, the court discharged the jury and rescinded the order of consolidation. The prisoner was then tried upon one of the indictments before the same jury—his counsel protesting on the ground that he had already been in jeopardy. After his conviction had been confirmed by the Supreme Court of the District in General Term, he sought relief by *habeas corpus*, on the ground that by his second trial he was deprived of the Constitutional privilege that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." It was claimed here that the court below in going on with the second trial exceeded its jurisdiction. But this court said: "We are of opinion that what was done by that court was within its jurisdiction. That the question thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and that its decision was the exercise of jurisdiction."

Ex parte Bigelow, 113 U. S., 328–331.

In a later case in the Supreme Court of the District of Columbia the defendant had been convicted of larceny —second offence. His first conviction was by a court without a jury. His counsel contended that the sentence as to the second offence was void, because the first conviction was of no effect in law, inasmuch as the defendant at his first trial had been deprived of his constitutional right to a trial by jury. This court reaffirmed its opinion in Bigelow's case, and denied an application for writ of *habeas corpus*.

In re Belt, 159 U. S., 95.

In 1883 a married woman filed a bill in the Court of Chancery of New Jersey against her husband for divorce on the ground of adultery. The defendant appeared and answered. In 1886 the plaintiff filed a supplemental bill charging other acts of adultery subsequent to the filing of the original bill. By order of the New Jersey court he was served with process under the supplemental bill *in the State of New York*. He did not appear or answer, and was found guilty of the acts of adultery charged in the supplemental bill. The final decree of the court awarded alimony. The plaintiff commenced an action in a court of the State of New York to recover alimony on this decree. The defendant insisted that the Court of Chancery in New Jersey had no jurisdiction to enter the decree on the supplemental bill, because he had not been served with process thereunder in that State. On the trial of the case the defendant examined as a witness a New Jersey lawyer, who testified that under the laws of New Jersey the decree sued on was void. The Court of Appeals of New York sustained this defense, assuming it to be a fact as found by the trial court that under the law and practice of the Court of Chancery of New Jersey, personal service within the State of process under the supplemental bill, was an indispensable prerequisite to the rendition of a personal judgment on that bill. After this decision of the Court of Appeals had been remitted to the Supreme Court of the State, and a judgment entered there, the case was brought here for review. This court reversed the judgment, saying:

"In the absence of any statutory direction on the subject and of any reported decision of the Supreme Court of that State we are justified in finding the law to be as declared in the very case in hand, where the chancellor of the Chancery Court of New Jersey has entered a final

decree based upon an original bill, the process under which was served upon the defendant within the State, and upon a supplemental bill, a copy of which with a rule to plead was served upon the defendant without the State. So long as this decree stands it must be deemed to express the law of the State. If the defendant deemed himself aggrieved thereby his remedy was by an appeal.

* * * * * *

"Even if, therefore, it was the *opinion* of Mr. Dickenson, the defendant's expert witness, that the chancellor of New Jersey erred in thinking that jurisdiction over the defendant personally was conferred by the service on him within the State of the subpœna under the original bill, and by the service on him, without the State, of a copy of the supplemental bill and of a rule to plead, such opinion does not support the finding of the trial court that, under the laws of the State of New Jersey, the decree sued on and offered in evidence was not binding upon the defendant personally. The opinion of the chancellor differed from that of the witness, and what is more important, his *judgment* was that, under the laws and practice of the State of New Jersey, the defendant was in his court, subject to its jurisdiction and bound by its decree." Laing *v.* Rigney, 160 U. S., 531–542, 543, 544.

But the Court of Appeals of New York in the present case, while not in terms disregarding the rule established by so many decisions of this court, came to the conclusion that this case is within certain established exceptions to the rule. We will first consider the cases in this court which the Court of Appeals in its opinion has referred to as sustaining the conclusion which it reached in the present case (Record, 136, 137).

In *Ex parte* Fiske, 113 U. S., 713, the petitioner was discharged on *habeas corpus* because the court below proceeding under State laws had ordered a defendant to submit to examination before trial, and upon his refusing to

submit to such an examination had imprisoned him for contempt. It was held that the State law did not apply to proceedings in the Federal courts, so that the order which was disobeyed was one the court had no power to make. In the present case there has been no imprisonment and not even a fine, and it is not questioned that the Supreme Court of the District of Columbia had the power to make the order directing the defendant to return the fund in controversy to the custody of the court, nor is it disputed that the final decree in the case was one which it was within its jurisdiction to make.

In Bonner's Case, 151 U. S., 242, the court below had directed that the petitioner should be imprisoned in a *State penitentiary*, whereas, there was no statute authorizing the court in such a case to send a defendant to a State penitentiary. All that this court did was to hold the sentence to that extent void, and to remit the prisoner to the court in which he was convicted for a better sentence.

Mills's case, 135 U. S., 263–270, was very much like the preceding case. The petitioner, having been sentenced to imprisonment in one case for a year and in another case for six months, the court had directed that he should be confined in the penitentiary, whereas by the statute governing such sentences the court had power to send him to the penitentiary only when the sentence was for more than one year.

In *Ex parte* Terry, 128 U. S., 289–304, the only question was whether the petitioner had been properly convicted of contempt without first giving him notice of the accusation and affording him an opportunity to be heard. This court held that it was bound to assume the facts to be as found by the Circuit Court; that upon those facts the court had a right to imprison the petitioner for contempt committed in its presence without giving him

a hearing. Incidentally the court re-affirmed what it had said in Fiske's case, *supra*, that when a court of the United States undertakes to punish a man for contempt for refusing to comply with an order which it had no authority to make, the second order is as void as the first.

Ex parte Reed, 100 U. S., 13–23, is the case above cited in which this court refused to interfere with the judgment of a court martial on the ground that it had jurisdiction of the person and of the subject-matter and was competent to pass the sentence imposed.

Frederich's case, 149 U. S., 70–76, is a case in which this court refused to interfere by *habeas corpus* and left the petitioner to his remedy by writ of error. He had been convicted of murder and sentenced to death, but the Supreme Court of the State had undertaken to modify the verdict into "murder in the second degree."

In Bigelow *v.* Forest, 9 Wall., 351, this court merely held that the statutes authorizing confiscation of enemy's property authorized a sale only of the life estate of the offender; that the decree in question in that case meant no more than this; and that the court which made the decree could not have gone further without transcending its jurisdiction.

In *Ex-parte* Lange, 18 Wall., 163–176, a court which had power to punish conviction of certain offences by a fine *or* imprisonment, imposed the punishment of fine *and* imprisonment. The prisoner had paid the fine, and then the court undertook to vacate its former judgment and re-sentence the prisoner to one year's imprisonment from that date. This court held (Clifford and Strong, JJ., dissenting) that this proceeding was a violation of the constitutional provision against double punishment for the same offense.

In the subsequent case of *Ex-parte* Parks, 93 U. S., 18, in which this court refused to interfere by *habeas corpus*,

the petitioner claimed that he had been convicted in a District Court of the United States of an offense which was not a crime against the laws of the United States. Lange's case was strongly relied upon by the petitioner's counsel, but this court said:

"In *Ex-parte* Lange we proceeded on the ground that when the court rendered its second judgment the case was entirely out of its hands. It was *functus officio* in regard to it. The judgment as rendered had been executed and satisfied. The subsequent proceedings were, therefore, according to our view, void. But in the case before us the District Court had plenary jurisdiction, both of the person, the place, the cause, and everything about it."

But the case principally relied upon by the Court of Appeals of New York, as well as by the counsel for the defendant in error is Windsor *v.* McVeigh, 93 U. S., 274. That case arose under the confiscation laws enacted by Congress during the war. Real estate belonging to McVeigh had been sold under a decree of condemnation of a District Court of the United States. McVeigh, being a non-resident, had been given notice by publication, and had appeared and filed his answer to the libel. But on motion of the district attorney the answer and appearance of McVeigh were struck out on the ground that it appeared from his answer that at the time of the filing of the same he was residing within the Confederate lines and was "a rebel." Thereupon the court immediately entered a decree condemning the property as forfeited to the United States, the decree reciting that the usual proclamation had been made and that the default of all persons had been duly entered. In another case in the same court against other property of the same person, similar action had been taken, and the judgment of condemnation reversed by this court on the ground that whether McVeigh was an alien enemy or not, his liability to be sued carried with it the right to defend himself. (McVeigh *v.* U. S., 11 Wall., 259, 267.)

The question presented, therefore, in Windsor *v.* Mc-

Veigh was whether the error of the court below was such that the decree was absolutely void even when under consideration in a collateral proceeding. It was held in substance (Miller, Bradley and Hunt, J. J., dissenting) that the legal effect of striking out McVeigh's appearance "was to recall the monition and notice as to him. His position with reference to subsequent proceedings was then not unlike that of a party in a personal action after the service made upon him has been set aside. A service set aside is never service by which a judgment in the action can be upheld. * * * It was not within the power of the jurisdiction of the District Court to proceed with the case so as to affect the rights of the owner after his appearance had been stricken out and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and there could be no exercise of jurisdiction. By the act of the court the respondent was excluded from its jurisdiction."

It will be seen that the ground upon which this court proceeded in Windsor *v.* McVeigh was that the action of the District Court left the case in just the situation in which it would have been if there had been no service of process upon the defendant, actual or constructive. In other words, having jurisdiction, the court threw it away by striking out not only the defendant's answer, but his *appearance.* In the present case it was the answer of the defendant only that was struck out; his appearance stood, and he remained subject to the power and jurisdiction of the court. The difference is obvious, material, and, as we think, decisive.

In a recent case in New York a defendant when present in court had been ordered to pay certain counsel fees and alimony. He then left the State and did not comply with the order, whereupon the Supreme Court in Special

Term struck out his *appearance and* his answer. He appealed to the Appellate Division of the Supreme Court, first department, where the case was heard before Van Brunt, P. J., and Barrett, Rumsey, O'Brien and Ingraham, J. J. In an opinion filed in June, 1896, the appellate division held that so much of the order as struck out the answer should be affirmed, but that it should be reversed so far as striking out the appearance was concerned, the court saying, "The defendant had a right to appear in the action so as to have notice of the subsequent proceedings." (Knott *v.* Knott, 39 N. Y. Supp., 804.)

In Lost Chance Mining Co. *v.* Tyler Mining Co., 157 U. S., 683, 694, 695, certain defendants who had appeared and filed an answer, withdrew the answer. It was held by the Circuit Court of Appeals for the Ninth Circuit that under the circumstances of the particular case, this took these defendants entirely out of the case in the District Court, so that they were no longer parties to the action, and were therefore not bound by the subsequent proceedings. But this court held that those defendants "were not taken out of the jurisdiction of the District Court * * * Where the defendant simply withdraws his answer, as was this case, the court is under no obligations to enquire whether he has lost all interest, but may proceed to judgment, and its judgment is an adjudication of the rights of the plaintiffs, as shown by the complaint and the testimony."

So, in an action at law on a promissory note, begun by foreign attachment, one of several defendants filed a plea, which, later, he withdrew. In another case in which the record in that case was offered in evidence it was claimed that as the only appearance of the defendant was by plea, its withdrawal took him out of court, so that no personal judgment against him could be entered, but this court said:

"We do not agree to this proposition. The filing of the plea was both an appearance and a defense. The case stood for the time between one term and another with an appearance and a plea. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the court. Having withdrawn that plea, he was in condition to demur, to move to dismiss the suit, if any reason for that could be found, or to file a new and different plea if he chose, either with the other defendants jointly or for himself. He was not by the withdrawal of the plea out of court. Such a doctrine would be very mischievous in cases where, as is very often, the first and only evidence of the appearance of the party is the filing of his plea, answer or demurrer. The case might rest on this for a long period before it was ready for trial, when, if the party could obtain leave of the court to withdraw his plea (and leave is generally granted without objection) he could thereby withdraw his appearance, the plaintiff is left to begin *de novo*." (Eldred *v.* Bank, 17 Wall., 551.)

Another instructive case in this connection is White *v.* Crow, 110 U. S., 188. In that case process had been served upon an agent of a defendant corporation, and he had entered the *appearance* of the corporation *before the return day of the writ.* Before the time for filing the answer had arrived a judgment was taken by default.

An attempt was made to assail this judgment collaterally, the principal objection made to it being that it was entered on the appearance only of the defendant, and the court had no jurisdiction to render the judgment until the time had arrived when the defendant by the writ served upon him was required to file his answer. But this court, after disposing of some other questions in the case, said:

"The question arises whether the rendition of the judgment before the time for filing its answer had ex-

pired renders the judgment void. We are of the opinion that it does not; that its rendition was simply erroneous and nothing more. The court having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all necessary presumptions to sustain it (Grignon's Lessee *v.* Astor, 2 How., 319)."

We submit that it is impossible to distinguish this case in principle from the one now before the court. In each case the appearance of the party gave jurisdiction to the court. In the one case, the court proceeded before the answer was filed by the defendant, and when, as a matter of fact, he had had no opportunity to be heard. In the other case it struck out his answer but did not strike out his appearance. In each case the defendant was denied the right to have his answer considered; but he was before the court; it had jurisdiction; and its decree, whether erroneous or not, was not void.

We have now reviewed all the cases relied upon by the Court of Appeals of New York in reaching its conclusion that by striking out the answer of McDonald and White the Supreme Court of the District of Columbia lost jurisdiction of the case against them. There are other cases, however, in this court which are relied upon by counsel here, or which may be deemed pertinent to the question before the court. The principal of these is Thompson *v.* Whitman, 18 Wall., 457, in which it was held that the judgment of a court in New Jersey reciting the finding by the court of a fact upon which its jurisdiction depended—the seizure of a certain vessel within the county—was subject to collateral attack and might be held void upon its being shown, as a matter of fact, that the seizure was not made within the county. This was the first instance in which the question of the right

to contradict a record as to the existence of a judisdictional fact recited in it came before this court. The case is sometimes cited as being inconsistent with many other cases in this court holding that the finding of a court in favor of the existence of a jurisdictional fact, can not be contradicted in another proceeding. But the distinction between Thompson *v.* Whitman and the other cases referred to is clear. It was made by Judge Sawyer in Holmes *v.* Oregon & Cal. R. Co., 7 Sawyer C. C., 384–400; and by the Court of Appeals of the District of Columbia in Railroad Co. *v.* Gorman, 7 Ap. Cas. D. C., 91–108. Where the question is, in a personal action, whether process was actually served upon the defendant within the jurisdiction of the court, or in a proceeding *in rem* whether the court seized the property within its jurisdiction, that question is not one that can be concluded by the decision of the court. But where the court has obtained jurisdiction in the first instance, either by proper service of process in a personal action, or in a proceeding *in rem* by a seizure within its jurisdiction, the finding of the court as to any jurisdictional fact subsequently arising in the course of the proceeding is conclusive in all collateral proceedings.

A case illustrating this distinction is Settlemier *v.* Sullivan, 97 U. S., 444–449, in which it was held (Ch. J. Waite, and Bradley and Harlan, JJ, dissenting) that where the record showed that the service of original process had been made upon defendant's wife and not upon him, and that the law required a personal service, the judgment was open to collateral attack.

A case that was much relied upon by counsel for the defendant in error in the court below is U. S. *v.* Walker, 109 U. S., 258, but all that was determined by the court

in that case was that when a probate court had authority to require a removed administrator to turn over to his successor certain classes of assets, its order requiring him to turn over something else was void.

In Guaranty Co. *v.* R. Co., 139 U. S., 137, this court held a judgment void where by law publication was substituted for personal service, and the judgment was rendered before the time given the defendant by the notice to appear had arrived. But the court carefully distinguishes the case from Cooper *v.* Reynolds, 10 Wall., 308, above cited, on the ground that in the latter case the court had obtained jurisdiction by the seizure of the property, which in itself is a species of notice to the owner.

Where a defendant was charged with three distinct acts of unlawful cohabitation and was convicted in each case and given cumulative sentences, this court discharged him on *habeas corpus* after he had served out the first sentence, on the ground that under the statute governing the case the three offenses were in fact but one (*In re* Snow, 120 U. S., 274). So, where a defendant was convicted of unlawful cohabitation and was afterwards tried for adultery, he defended on the ground that he had been punished for the adultery under his conviction of unlawful cohabitation. This defense having been overruled, and a second conviction following, this court discharged him on *habeas corpus* on the ground that the court had exceeded its jurisdiction in punishing him twice for the same offense. It may appear somewhat difficult to reconcile this case with Bigelow's case, 113 U. S., 328, but the doctrine of that case, as we have seen, was re-affirmed by this court in Belt's case, 159 U. S., 95. Some light is thrown upon the extent to which this court has gone in *habeas corpus* cases, after conviction of the prisoner in a criminal court, by the remark of Mr. Justice Bradley in delivering the opinion in *Ex parte* Siebold, 100 U. S., 371–

377, in which case the discharge of a prisoner was sought on the ground that the act of Congress under which he was convicted was unconstitutional. This court held that conviction under such a law would be absolutely void, but in the particular case sustained the statute. Justice Bradley said:

"It is true if no writ of error lies the judgment may be final in the sense that there may be no means of reversing it. *But personal liberty is of so great moment* in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court, or judge, having authority to award the writ."

But whether or not this court has seen fit to go further in criminal cases where it had no power to review a judgment of conviction in any direct proceedings, than in civil proceedings where the party whose interests are affected by the judgment or decree may have his writ of error or appeal, these cases in no wise sustain the judgment in the present case, for they are all based upon the ground that the court was without power under any circumstances to enter the judgment under consideration. No such question is made here. The same remark applies to Griffith *v.* Frazier, 8 Cr., 9; Williamson *v.* Berry, 8 How., 495; Lessee of Hickey *v.* Stewart, 3 How., 750; Lancaster *v.* Keeler Miller, 123 U. S., 376; and Reynolds *v.* Stockton, 140 U. S., 254. These were all cases in which it was held that the judgment or decree complained of was one which it was beyond the power of the court to make in the particular case. Pennoyer *v.* Neff, 95 U. S., 714, simply affirms the doctrine that service of process upon the defendant personally in some form is necessary to give the

court jurisdiction to enter a personal judgment against him.

Upon this review of the cases in this court we again affirm the law to be that where a court has jurisdiction of the parties and of the subject-matter, and the judgment or decree which it enters is one which it has power under any circumstances to make in the cause, such judgment or decree can not be collaterally assailed on account of anything that may have happened between the appearance of the defendant and the entering of the judgment. The only case that has any appearance of being an exception to this rule is Windsor *v.* McVeigh, and in that case, as we have seen, the decision of this court was put upon the sole ground that by striking out the *appearance* of the defendant the case was put in the same position in which it would have been if he had never been summoned into court at all.

Riggs & Company Were Purchasers Pendente Lite.

We do not regard this as an open question in the case, for it seems that it, along with all other questions in the case except the validity of the final decree of the Supreme Court of the District of Columbia, has been settled in favor of the plaintiff in error by the decision of the Court of Appeals of New York when the case was first before it (118 N. Y., 125,—see Appendix to this brief), and by the referee's findings of fact, which, having been affirmed by the Superior Court in Special and General Term, are no longer open to controversy. In the opinion of the Court of Appeals rendered when the case came before it the second time, it in one place indicates that this question is open, while in another it seems to take it for granted that it is closed. Thus the opinion reads in one place, "We shall also for the purpose of this review assume,

without deciding the question, that Riggs & Company were purchasers of the bonds *pendente lite* with knowledge of the existence of the suit" (132); and in another, "As purchasers *pendente lite*, Riggs & Company took the risk of the litigation then pending, but in so doing did not assume the risk of any punishment that might be inflicted upon McDonald and White in an independent proceeding" (138).

Counsel for the defendants in error, while conceding the law to be that one who purchases property pending a suit in which a claim against it is asserted, takes it subject to the final result of the suit just as though he were a party to it himself, claimed in the court below, that where there is an interval between the final judgment or decree in the court in which the issue is first determined, and the taking of an appeal or the suing out of a writ of error to an appellate tribunal, one who purchases during such an interval is not a purchaser *pendente lite*. It will be found, we think, that this rule applies only when the purchaser takes without notice of the litigation. In this case Riggs & Company had notice. But this is immaterial, because it is clear that Riggs & Company did not become purchasers of the bonds in question during any such interval.

The first decree in the Special Term of the Supreme Court of the District of Columbia sustaining the defendant's demurrer and dismissing the bill of complaint was made on June 24th, 1875 (Referee's rep., Rec. 61; "Defendants' Exh. No. 1," p. 84). *On the same day* the plaintiffs appealed from that decree to the Supreme Court of the District in General Term (Referee's rep., Rec. 61). This appeal appears in full in "Defendants' Exh. No. 1," page 85, and is as follows:

"June 24, 1875.

"Hovey, *et al.*,
v
McDonald, *et al.*
} *3937 Equity.*

"Enter appeal to General Term from the order sustaining demurrer and dismissing bill.

CHAS. E. HOVEY.

"Appeal entered as per order,

By the Clerk."

On the 28th of June, 1875, a second decree was entered in the Special Term, which was the same as the first except that there was added a clause directing the receiver to pay the funds belonging to the cause to the defendants (Referee's rep., Rec. 61; "Defendants' Exh. No. 1," 856). These two decrees of June 24th and June 28th, respectively, are also to be found in full on page 32 of the Record.

On June 28th, 1875, after the decree of that date had been made, Mr. Riggs, the receiver, delivered the bonds in his hands to McDonald, and on the same day the firm of Riggs & Company, of which he was a member, purchased them from McDonald (61, 62). An appeal to the General Term from the decree made on June 28th, 1875, was entered on July 2d, 1875 (Record 62; "Defendants' Exh. No. 1," 87). On the 6th day of July, 1875, Judge Wylie, who had made both the decrees in question, made this order:

"In the Supreme Court of the District of Columbia.
The 6th day of July, 1875.

"Chas. E. Hovey and Wm. P. Dole
v.
Augustine R. McDonald, *et al.*
} *In Equity No. 3937.*

"On consideration of the motion filed in the above entitled cause by the complainants on the 1st day of July, 1875, praying that the amount and character of the security to be given by them in order to render their appeal, *taken on the 24th day of June, 1875, to the decree on that day passed in the said cause*, a *supersedeas* might be determined by the order of this court, it is now, this 6th day of July, 1875, by the court ordered that the security to be so given by the complainants or by one of them be, and the same is, hereby fixed in the sum of one hundred dollars, with such surety or sureties as any justice of this court may approve, it appearing to the court that the fund in controversy has already been paid over to the defendants.

"And on consideration of a further motion, made in open court by the complainants this 6th day of July, 1875, praying that the amount and character of the security to be by them given in order to render their appeal, *taken on the 2d day of July, 1875, from the further decree passed in said cause on the 28th of June, 1875*, a *supersedeas* may be determined by the order of this court, and after argument of such further motion, as well by the counsel of complainants as by the counsel for the defendants, it is now, this 6th day of July, 1875, by the court ordered that the said motion be, and the same is, hereby overruled.

"By the court. A. W."

("Deft's Ex. No. 1," pp. 88, 89.)

From this it will be seen that the court which made these two decrees treated the first one as the principal decree and the other as merely amendatory thereof.

The referee finds that on "the 12th day of July, 1875, a *supersedeas* bond was filed by the complainants on said appeal" (62). From the context it might be inferred that a bond was given only on the appeal from the decree of June 28, 1875, but as a matter of fact, two separate bonds were given, both of which were approved by Judge Wylie—one of them being a bond on the appeal from the decree of June 24th, 1875, and the other on the appeal from the decree of June 28th 1875, ("Defendants' Exh. No. 1," 89, 90, 91).

The decree of the General Term subsequently made, recites that the case came on to be heard in the General Term "on appeal from the decrees respectively passed in the said cause at the Special Term of this court on the 24th day of June, A. D. 1875, and on the 28th day of June, A. D. 1875" (Rec. 33). The decree in the General Term was that "*the said decrees* be, and they are hereby, reversed with costs" (Rec. 33).

Upon this state of facts we submit that it is impossible to successfully contend that when Riggs & Company purchased these bonds there was no appeal pending. The suggestion that the decree of June 24th was abandoned when the decree of June 28th was entered, and that when it was abandoned the appeal which had been taken from it fell with it, is too technical and too inconsistent with the action of the court both in special and in General Term to merit serious consideration here. This objection was overruled by the referee. In answer to the second conclusion of law, submitted by the plaintiff he held that Riggs & Company purchased the bonds during the pendency of the suit (79), and in response to the fifth, sixth and seventh conclusions of law submitted on behalf of the defendants, he found that the decree of June 24th was not superseded and vacated by the decree of June 28th; that the suit was pending at the time of the purchase of the

bonds by Riggs & Company; and that at the time of the purchase the suit had not resulted "in a single final decree from which no appeal had been taken" (93).

And this court has already taken the same view of this matter. When the case was here on the complainant's appeal from the decree of the court below holding that the receiver was protected by the order of the court under which he delivered the bonds to McDonald, Mr. Justice Bradley, delivering the opinion of the court said:

"In the case of Hovey and Dole a decree was entered on Thursday, the 24th of June, 1875, simply decreeing that the demurrer to the bill be sustained and that the bill be dismissed with costs. An appeal to the General Term was entered the same day on the minutes of the court. On Monday, the 28th of June, 1875, the decree was amended by adding thereto the clause," etc. (Hovey *v.* McDonald, 109 U. S., 153, 154.)

It can not be said that this is not a Federal question. To hold that the decree of April 17, 1878, has no operation as against Riggs and Company would certainly be a failure to give due faith and credit to that decree. They had become the owners of the property in controversy. They were thereafter *quasi* parties. They had the right to become defendants in name as they were in fact. (*Ex parte* Railroad Company, 95 U. S., 221; Stout *v.* Lye, 103 U. S., 66).

Conclusion.

Some other propositions of law were argued in the court below by the counsel for the defendants in error, and may be urged here, but we think that the points already considered must dispose of the case. There seems to us to be no ground for the contention that the decree against McDonald and White in the Supreme Court of

the District was entered against them without due process of law. They had been summoned into court, and were represented by counsel until the final decree against them was made. Instead of turning them out of court, as was done to the defendant in Windsor *v.* McVeigh, the whole effort of the complainants and of the court was to get them before the court. The time that elapsed between the beginning of the proceedings against them for contempt and the final decree, was about ten months, and every step that was taken during that period was upon notice to their counsel of record.

Nor do we see any reasonable support for the suggestion that the decree of April 17, 1878, even if binding upon McDonald and White, is not as binding upon defendants in error as it would have been if the case had gone on to a final decree in the usual way. This suggestion, as we understand it—and as the court below seems to have accepted it—is that the final decree in question occupies a sort of middle ground between one which is binding on parties and privies and one which is absolutely void. We know of no precedent or authority for such a conclusion.

Riggs & Company at any time after they purchased the bonds in question from McDonald would have had the right to intervene in the suit and take care of their interests, by separate counsel, if they so desired. They chose to allow the defendants to go on with the defense in their own way, and can not now be heard to complain that that way was a bad one. We think that the Supreme Court of the District of Columbia under the circumstances in which it was placed proceeded carefully and deliberately in the only way which was consistent with the rights of the complainants and the dignity of the court, and that all that it did was legal and regular. But whether it did the right thing or not, it seems to us impossible to deny

that in the absence of any express statute applying to such a situation, and in the absence of any authoritative determination upon the subject by this court, the final decree of that court must in other jurisdictions be conclusively held to have been in accordance with the law of the District, just as in Laing *v.* Rigney, 160 U. S., 543, it was held that the opinion of the Chancellor of New Jersey, as manifested by his judgment entered in a case before him, established for the time being for courts in other jurisdictions "the laws and practice of the State of New Jersey" applicable to the case in which that judgment was entered. There being no other Federal question in the case, and all other defences relied upon having been decided by the State Court in favor of the plaintiff in error, we ask that the case be remanded to the Court of Appeals of New York, with instructions to cause to be entered final judgment in favor of the plaintiff in error.

A. S. WORTHINGTON,
Of Counsel for Plaintiff in Error.

Opinion of the Court of Appeals of New York in Hovey v. Elliott, 118 N. Y., 132.

BRADLEY. J.

The case was determined by the court below in favor of the defendants upon the defense of the statute of limitations. And that is the main question for consideration upon this review.

By the contract, between the plaintiffs and McDonald, they were to have, for their services in aiding him in the prosecution of his claim before the mixed commission on British and American claims a sum equal to twenty-five per cent. of the amount which should be allowed or awarded to him. And in their behalf "the payment of the said sum of twenty-five per cent. was to be made a lien upon the claim, and upon any draft, money or evidence of indebtedness which might be paid or issued thereon."

After the award was made in favor of McDonald for $197,190 in gold, he assigned it to White, and thereupon, and while the award yet remained in the hands of the diplomatic representatives of the British Government the plaintiffs filed their bill against McDonald and White, in the Supreme Court of the District of Columbia, to restrain them from disposing of, collecting or receiving more than three-fourths of the amount of the award, and for a decree establishing the plaintiff's lien, and a temporary injunction was issued in their behalf. Upon an order being made to that effect, and appointing George W. Riggs receiver, a portion of the fund was paid over to White, as assignee of McDonald, and the balance was taken by the receiver, with directions to invest it in a certain class of bonds of the District of Columbia, which he did. The defendant's demurrer to the plaintiff's bill having been afterward sustained and decree entered dismissing the bill, the court ordered that the bonds held by the receiver be handed over to McDonald and White, which was done, and thereupon they transferred them for value to Riggs & Co., of which firm George W. Riggs was a member, and the firm thereupon surrendered those bonds and procured new ones to be issued to it, and afterwards sold them in the market to divers purchasers.

In the mean time, the plaintiffs had taken an appeal to the General Term of the Supreme Court of the District of Columbia, from the decree, dismissing their bill of complaint, and it was reversed in March, 1876, and the suit remanded to the Special Term, with leave to the defendants therein to answer, which they did. And those defendants having failed to pay into court to the credit of the suit, the sum of $49,297.50, as directed by its order, their answer was stricken out and from the files, and decree was taken *pro confesso* against the defendants, and on the 17th day of April, 1878, a decree absolute was made, by which it was adjudged that McDonald and White pay to the plaintiffs the sum of $49,297.50, and that the latter have a lien upon the claim of McDonald, against the United States, as awarded by the mixed commission on British and American claims and upon any draft, money, evidence of indebtedness, or the proceeds thereof, with interest from April 17, 1878. This action was brought within six years after the decree last mentioned was made, and more than six years after such reversal of the decree dismissing the complaint.

The court below held that the statute of limitations commenced to run from a time not later than the time of such reversal, and holding that plaintiffs had a remedy by action at law agaist the defendants resulting from that sale, concluded that the right of action was barred on the expiration of six years. The defendant's firm having purchased the bonds of McDonald and White or one of them *pendente lite*, charged with knowledge of the pending action and its purpose, were bound by the result of the litigation in the suit against McDonald and White as effectually as if they had been parties to it, so far as related to the lien of the plaintiffs upon the property. (1 Story Eq. Jr., Sec. 405; Heatly *v.* Finster, 2 John. Ch., 158; Murray *v.* Lylburn, *Id.*, 441; Jackson *v.* Stone, 13 John., 447; Jackson *v.* Losee, 4 Sandf. Ch., 381; Tilton *v.* Cofield, 93 U. S., 163; Clark *v.* Farrow, 10 B. Monroe, 446; 52 Am. Dec., 552; Shelton *v.* Johnson, 4 Sneed, 672; Stone *v.* Connolly, 1 Met. [Ky.], 652; 71 Am. Dec., 499; Green *v.* Rick, 121 Penn. St., 130; 6 Am. St. R., 760.

And for the purpose of the lien the defendants may be deemed to have held the bonds taken from McDonald

and White and the re-issue to them, in trust for the plaintiffs while they had them, (Murray *v.* Ballou, 1 John. Ch. 566); and in like manner the proceeds of the sale, (2 Perry on Trusts, Sec. 838; Sadler's Appeal, 87 Penn. St., 154; Pennell *v.* Duffell, 4 DeGex. M. & G., 372; Knatchbull *v.* Hallett, L. R. 13 Ch. Div. 696; 36 Eng. Rep. 779; Sheppard *v.* Taylor, 5 Pet. 675).

In view of the relation of privity in which the defendants were placed, with McDonald and White, by force of the doctrine of *lis pendens* somewhat broadened by the fact of actual notice, on their part, of the situation, it became the duty of the defendants, when the decree was obtained against McDonald and White, to pay to the plaintiffs, from the proceeds of the sale of the bonds, an amount sufficient to satisfy their lien upon them. If the defendants had then held the bonds, such decree may have been effectual to have reached them through the execution of the judgment.

The relation and situation of a purchaser *pendente lite*, is such that his protection against the result of the then pending action must be sought in it, and for that purpose he may step in and defend, or the plaintiff in it, to charge him *in personam*, may cause him to be brought in as a defendant. (Harrington *v.* Slade, 22 Barb. 161; *Ex parte* Railroad Co., 95 U. S. 221.) And when the purchaser is so brought in and made a defendant, he will be treated as such party from the time of the commencement of the action, and consequently the statute of limitations will in such case be no more available to him than to the original defendants. And such would be the effect of the judgment as one *in rem*, although the purchaser is not made a party to the action. (Harrington *v.* Slade, supra; Walden *v.* Bodley, 9 How. U. S., 34; Fletcher *v.* Ferrel, 9 Dana, 372; 35 Am. Dec., 143; Talbott *v.* Bell, 5 B. Monroe, 320; 43 Am. Dec., 126; Jackson *v.* Losee, 4 Sandf. Ch., 381). This binding character and effect are deemed essential to the proper administration of justice and to put an end to litigation. (Bellamy *v.* Sabine, 1 DeGex. & J., 566, 578.) The defendants not having been made parties defendant in that suit, the decree as against them, could be treated only as a judgment *in rem* and, as they had disposed of the bonds, it

was ineffectual as such for the purpose of its execution. And it may be that their duty to pay to the plaintiffs the proceeds of the bonds, was but a liability enforceable by action to charge them *in personam.*

While an action in equity might be maintained to charge the defendants as trustees of the fund, and for an accounting as for the proceeds of the bonds, for the purpose of relief founded upon the lien, it is contended that the plaintiffs had ample remedy by action at law for destruction of their lien, or as for money had and received by the defendants to the plaintiffs' use. The question whether an action at law accrued to the plaintiffs against the defendants more than six years before this was commenced, is an important one in this case. For if that was the situation, although this action, as brought, was properly equitable in form, the statutory limitation of six years was applicable upon the well settled principle, that when there is a concurrent remedy at law and in equity, the limitation is the same in both forms of action, and the statutory bar of that at law controls. (Borst *v.* Corey, 15 N. Y., 505; *In re* Neilley, 95 N. Y., 383.) The plaintiffs may have maintained a suit in equity against the defendants, joining McDonald and White as co-defendants, for the purpose of perfecting their lien and to charge Riggs & Co. personally, after as well as before, the sale by the latter of the bonds. But it is by no means clear that an action at law would have been maintainable by the plaintiffs against the defendants in this action, founded upon the lien to recover the amount of their claim prior to the recovery of the decree against McDonald and White. The plaintiffs' right to a lien existed in contract, entered into before the award was made by the commission, by the terms of which, the payment of their claim for services was to be made a lien upon it. This was an equitable lien. It was neither *jus ad rem* nor *jus in rem.* It constituted no estate or property in the subject of it, nor any right which could be the basis of a possessory action. It was simply an incumbrance or charge upon it. The legal title remained in McDonald. (2 Story Equity Juris., Sec. 1215; 3 Pomeroy Eq. Juris., Sec. 1233.) For the purposes of the lien, the proceeds of the sale took the place of the bonds, and the enforcement of it was ex-

clusively within the province of a court of equity by suit, in which McDonald was a necessary party defendant until as against him the lien was perfected. And although the assignment must be deemed to have been taken by White, subject to all the equities against his assignor (Bush *v.* Lathrop, 22 N. Y., 535), it could not be assumed that he had no right to be heard. The contract upon which the plaintiffs relied for the lien was executory, and the effectual perfection of it was dependent upon performance upon their part, of that required of the plaintiffs, to entitle them to payment. In equity it had effect as a lien, dependent on such performance, upon the principle that what is agreed and ought to be done is regarded as done. And if anything was requisite to accomplish it, the court could have directed such specific performance of the contract. (Pomeroy Eq. Jur., Sec. 1237; *In re* Howe, 1 Paige, 125, 130; Hale *v.* Omaha Nat. Bank, 49 N. Y., 626; McCaffrey *v.* Woodin, 65 *Id.*, 459; Payne *v.* Wilson, 74 *Id.*, 348; Seymour *v.* C. & N. F. R. R. Co, 25 Barb., 284; Mitchell *v.* Winslow, 2 Story, 630; Metcalfe *v.* Archbishop of York, 1 Mylne & C., 547.) The only means for the enforcement of the lien was in equity. (Pinch *v.* Anthony, 8 Allen, 536, 539; Milliman *v.* Neher, 20 Barb., 37). It would have been otherwise if the contract had contained an assignment of the claim of the plaintiffs. That might have furnished a right of action at law, if the claim may be said to have had a potential existence at the time it was made. (Jones *v.* Mayor, etc., 90 N. Y., 387.) And as held in McCaffrey *v.* Woodin (supra), and Gregory *v.* Morris (96 U. S., 619), when with the equitable lien is given the right to take the property, the exercise of such right perfects the lien, and enables the party to assert it as a defense or in support of an action founded upon the right resulting from the execution of such power, and is supported by the lien. And in the like case of Wisner *v.* Ocumpaugh (71 N. Y., 113), the defendant was protected in the exercise of such right and the defense resting upon the lien, was deemed equitable. In Hale *v.* Omaha Nat. Bank (*supra*) no right by the terms of the contract, for the lien, seems to have been given to take the property, and the possession, as there appeared, was taken by the defendant without any right. The question

of parties was not raised in that case. Nor did the court hold that an action at law could be maintained by the plaintiff, but it was held that the facts alleged were sufficient to support the action as equitable in character. And on the review of a subsequent trial of the same action (64 N. Y., 550) nothing to the contrary was held. In Husted *v.* Ingraham (75 N. Y., 251) the plaintiffs had an equitable lien, and it was held that the only relief to which the plaintiffs were entitled was equitable, and consequently they could not recover in the action for alleged conversion of the property, although it had been sold by the receiver of the parties, who had the title, but that the plaintiffs had a remedy in equity against the receiver founded upon the lien, to obtain the proceeds of the sale. The character of the equitable lien, resting in the contract between McDonald and the plaintiffs, was such that it gave the latter the right to follow the subject of it, and apply a remedy which would have operated directly upon it, to realize the purpose of its creation. This was the purpose of the suit brought against McDonald and White. That suit was founded upon the contract, and its purpose was to perfect and execute the lien. This could be done in equity only. The existence of the lien and the right to enforce it were contested by McDonald. And treating, as we do, the defendants as purchasers *pendente lite*, charged with notice of the action between the parties to the contract and its purposes, the rights of the parties to this action or to the subject in controversy, were dependent upon the result of that suit, and the final judgment there was conclusive upon them. It would, therefore, seem that during its pendency the statute of limitations would not run in favor of such a purchaser as against the party who successfully establishes his right as against the *pendente lite* seller. Otherwise the doctrine of *lis pendens* might be defeated, and thus the result of a litigation rendered ineffectual. It would result in a multiplicity of suits for the protection of rights dependent upon the final determination of the litigation pending between the primary parties to the controversy. The theory of the doctrine of *lis pendens* is to preserve the situation, as it is when the original litigation is commenced, until its termination, that the successful party may then take the

fruits of it without interruption from another, who may have, during its pendency, sought to obtain some right to the property in controversy. (Tilton *v.* Cofield, 93 U. S., 163; Lamont *v.* Cheshire, 65 N. Y., 36, and cases there cited.) Bennett, in his work on *Lis Pendens* (212), states the rule to be that in the ordinary case of a *pendente lite* purchaser of the subject of litigation, the statute of limitations can not be invoked as against the successful litigant to avoid the results of the application of the rule of *lis pendens*. This is in harmony with the situation of privity existing between the litigating seller and the *pendente lite* purchaser, with the fact that the latter is bound by the determination of such pending action, and with the principle enunciated in Harrington *v.* Slade (22 Barb., 161); Walden *v.* Bodley (9 How. U. S., 34), Tilton *v.* Cofield (93 U. S., 163). Any action which the plaintiffs could maintain against the defendants, must be founded upon their equitable lien. And it would, therefore, seem that the situation of the defendants in their relation to the primary suit, was such that during its pendency the statute of limitations would not run in their favor to bar any form of action having for its object the satisfaction of the plaintiff's claim, founded upon the security afforded by such lien. If that view is correct, it follows that no right of action at law either for the destruction of the lien or for money had and received, accrued to the plaintiffs against the defendants prior to the time of the recovery of the decree against McDonald and White. And assuming that there was a destruction of the lien produced either by the surrender of the old and taking the new issue of bonds, or by the sale of the latter, it does not necessarily follow that an action at law would at any time lie against the defendants to recover damages for such destruction. It was not found that the defendants so surrendered the bonds or sold those re-issued to them with the intent to defraud or injure the plaintiffs in their lien or with any purpose to defeat it. (Yates *v.* Joyce, 11 Johns., 136; Lane *v.* Hitchcock, 14 *Id.*, 213; Gardner *v.* Heartt, 3 Denio, 232). The case last cited was an action by a mortgagee for an alleged negligent destruction of his lien, by doing injury to the mortgaged premises, which had that effect. The court held that fraudulent intent was

essential to support the action, and that, as the lien of the mortgagee gave him no title to the land, the defendant was not liable to him for injury to it caused by his negligence, although it resulted in the destruction of his lien. That is within the principle of those earlier cases. They are all cited in Van Pelt *v.* McGraw (4 N. Y., 110), and their doctrine is there applied to afford a remedy. The facts found in the present action, as represented by the decision of the court, do not, within that principle, establish the existence, at any time, of such a cause of action against the defendants. The cause of action for the purpose of such a remedy is in tort. Its gravamen is a fraudulent intent or wrongful purpose to impair or destroy the lien, and to support such an action the facts must be such as to warrant the inference to that effect. No different doctrine was necessarily recognized in Hale *v.* Omaha Nat. Bk. (65 N. Y., 550), or in Husted *v.* Ingraham (75 N. Y., 251). The plaintiffs have no title to the bonds, and in the strictly legal sense of the term, their lien is said not to be property, although analogous to property. (3 Pomeroy Eq. Jur., Sec. 1234). And a lien is generally recognized at law to exist only when it is connected with the possession, or the right to the possession, of the subject to the lien. (2 Story Eq. Jur., Sec. 1216.) The defendants had the legal title to the bonds transferred to them, also to those taken in their stead by the new issue made to them, and which they afterwards sold. It may be that they made such surrender, took the new bonds and sold the latter in good faith, in fact, and without any intent to impair or defeat the plaintiff's lien. While the right of the plaintiff, as against the defendants, resulting from the final decree, was not affected by the decree and direction founded upon the sustaining of the demurrer, the fact of such decree dismissing the complaint first obtained in their suit with McDonald and White, was a circumstance bearing upon the good faith of the defendants by way of relief from the imputation of actual purpose to impair the plaintiff's lien by the disposition made of the bonds. In view of the doctrine before stated, and as declared in Gardner *v.* Heartt, the defendants may not be chargeable in an action as for impairment or destruction of the plaintiff's lien. And, therefore, upon

the facts found as represented by the decision of the trial court, the conclusion is not warranted that any right of action at any time arose as for the destruction of the lien. But on the contrary, the facts so found are consistent with good faith, in fact, on the part of the defendants, in purchasing the bonds and disposing of them. So far as the contention on the part of the defendants is dependent for its support upon their bad faith in the transaction, it is not sustained. And the assertion by a party of his wrongful act by way of protection against liability will not usually be taken for his advantage further than the facts barely require. The plaintiffs do not assert the destruction of their lien. The question also arises, was the lien destroyed in the sense sought to be applied by the disposition made by the defendants of the bonds so as to enable them to assert the destruction of it by way of relief from liability? It is true that the opportunity to reach the bonds held by the receiver is denied to the plaintiffs by the surrender of them at the time the new ones were issued to the defendants. The latter bonds represented the former, and so did the proceeds of the sale in the currency received by the defendants. There is no propriety, either legal or moral, in the assertion of the defendants, for the purpose of putting themselves in the wrong, that those new bonds or the money derived from the sale, was not a substitute for those held by the receiver which they purchased. An equitable lien has the nature of or is analogous to a trust, and it is not for the party making the conversion into other securities to thus defeat the trust. He can not derive any such advantage, but the substituted securities or proceeds in his hands are subject to it. And for the purpose of relief he is treated as having made the substitution for the benefit of the beneficiary if the latter elects to so treat it. This was the situation of the defendants in their relation to the plaintiffs, and that is the situation in which the plaintiffs seek to treat the defendants. The sale of securities held in trust or subject to an equitable lien, might be thought judicious by the holder under some circumstances. He might deem it so in case of a falling market or of an apprehended decline in value, or for the purpose of realizing a larger income from the fund represented by

them. It would hardly be claimed that from a sale, in such case, a liability would arise as for a destruction of the lien, although he might be liable to account for the value of the securities if his action in making the sale was not justified or ratified. Nor would the party, in that relation, making such sale or in case of conversion of the securities into others, be permitted to successfully assert that he had committed a wrongful act, which might have produced a remedy to the beneficiary of the lien or trust, so as to deny to the latter the right of affirmance of the act of conversion and substitution. The plaintiff's claim does not rest upon the assertion of any wrong on the part of the defendants in making the disposition they did make of the bonds. The action was brought to enforce their lien upon them and without knowledge of the sale, and afterwards having learned of the disposition of the bonds, the plaintiffs proceed in affirmance of the sale, and seek through an accounting by the defendants for the proceeds of the sale, the relief to which the plaintiffs, by virtue of their lien, may be entitled by way of satisfaction of their claim of which such lien is the incident. When the plaintiffs obtained the decree against McDonald and White, it became the duty of the defendants to hand over to them such proceeds, and concurrently in time with the arising of such duty accrued to the plaintiffs the right to demand its performance.

The question relating to an action at law for destruction of the lien, seems to require here no further consideration. Some further attention may be given to the question, whether the plaintiffs had a right of action at law against the defendant as for money had and received by them to the use of the plaintiffs. And, if so, when the right to such action accrued to them. When one party receives or has money to which another is entitled, an action in that form, may be maintained, and the law will apply assumpsit for its support. And although the action rests upon a legal right, the nature of the remedy afforded by it, is such as to raise for determination the question as to which party in equity and good conscience is entitled to the money in controversy. Hence, it is called an equitable action. (Buel *v.* Boughton, 2 Denio, 91; Hathaway *v.* Cincinnatus, 62 N. Y., 447). The plain-

tiffs were equitably entitled to the proceeds of the sale of the bonds, to the extent of their claim, by reason of their lien upon them. The right of such action accrued when it became the duty of the defendants to pay the money over to them. That duty and liability of the defendants were dependent upon the effectual establishment of the lien against McDonald. A defeat of the plaintiffs, upon the merits, in the suit against McDonald and White, would have denied to the former the right to assert any lien as against the defendants. Such was the effect of the judgment on the demurrer dismissing the bill, so long as it remained unreversed. The liability of the defendants in such an action, was therefore dependent upon the result of that suit, and if they had paid the plaintiffs the amount claimed by them, and that suit had resulted in favor of McDonald, it is not seen that the defendants would have had any remedy against their assignor, of the bonds, for reimbursement. It would have been treated as a payment without any duty or liability to make it. McDonald had the right to contest the plaintiff's alleged claim of lien, and it was not in the power of the defendants to deny to him that right, or to render his successful denial of it ineffectual. This was the situation of the defendants in their relation to the other parties interested, until the final decree was obtained against McDonald and White, until then the defendants could not assume that they were at liberty to pay anything to the plaintiffs from the proceeds of the sale of the bonds. When then did the right of action at law accrue to the plaintiffs against the defendants? As before suggested the lien upon which the plaintiffs relied existed in executory contract, and was cognizable in equity only, until it was perfected either by recognition or contract of McDonald, in terms making it so *in presenti* after performance by the plaintiff, or by decree to that effect. It being a lien in equity, and subject to equitable cognizance only, it furnished no support to an action at law for affirmative relief until it was in some manner perfected or established. (Field *v.* Mayor, etc., 6 N. Y., 179, 187; Chase *v.* Peck, 21 N. Y., 581; Payne *v.* Wilson, 74 N. Y., 348; Otis *v.* Sill, 8 Barb., 102.) Reference is also made to the cases before cited. The contract in question may be treated

as an agreement to give the plaintiffs a lien dependent upon the terms and conditions of the contract, and while it attached as a lien in equity upon the award when made, it was not by force of the contract made a specific lien *in presenti* or recognizable at law until it was perfected by the decree. And even then no right of action at law upon the lien as such existed to obtain the possession of the property or its proceeds as that remedy is equitable only, but then, if at all, the right of action at law, founded upon the right to the fund supported by the lien, accrued to the plaintiffs to treat the proceeds as money had and received to their use by the defendants, and to demand its payment, because then, and not until then, it became the duty of the defendants to recognize the right of the plaintiffs in that respect. Up to that time the lien was not only not recognized by McDonald, but was contested by him. And until then the plaintiff's remedy must have been founded solely upon the alleged lien, and enforceable in equity only. The action would necessarily have been to charge the property or its proceeds with it, and for consequent relief. This is apparent for the reason, if no other, that the defendants were by their purchase *pendente lite* placed in privity with McDonald and bound by the result of the then pending suit, and their right and duty, as related to the plaintiffs, were involved in it, dependent upon its result and determined by it. It was not until then that the duty of the defendants arose to discharge the plaintiff's lien, or that the latter could enforce the performance of that duty by action as for money had and received to their use. The case of Pierson v. McCurdy (33 Hun., 521; affirmed 100 N. Y., 608), has not necessarily any essential application to the question here. There the fund in controversy belonging to the company represented by the plaintiffs had been wrongfully paid to and taken by the defendant. There was in that case the legal title to support an action for money had and received, and the right to [illegible] when the money was [illegible] unlawfully [illegible] already [illegible] the [illegible] and [illegible] title

167-409

FILED
MAR 31 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 255.

CHARLES E. HOVEY, PLAINTIFF IN ERROR,

vs.

GEORGE E. ELLIOTT AND GEORGE L. ELLIOTT,
EXECUTORS, ETC., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

H. B. TITUS,
Of Counsel for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

IN THE

Supreme Court of the United States.

No. 255.

CHARLES E. HOVEY, PLAINTIFF IN ERROR,

vs.

GEORGE E. ELLIOTT AND GEORGE L. ELLIOTT,
EXECUTORS, ETC., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The defendants' whole case rests upon the assumption that the answer of McDonald and White was stricken out as a punishment for their contempt. The referee says in his opinion that "the court had avowedly and distinctly pursued that course by way of punishing the defendants for their contempt in refusing to obey the court's order for the deposit of moneys in its registry," and on this assumption of fact bases his conclusions of law; but there is nothing of the kind in the record; no such allegation, no such finding, no such request to find, and there is no such fact. On the contrary, the court's own opinion shows that it had

avowedly and distinctly pursued that course "*to secure obedience to its authority.*"

The word "punish" does not appear in the opinion of the court in any form, nor is there any suggestion even of punishment. In the proceedings it appears twice only, in the motion and in the order reciting the terms of the motion. But the motion and order to show cause were not why the defendants should not be punished *for their* contempt, but "*as* for *a* contempt"—words descriptive, distinguishing, and of unmistakable meaning, for it is an expression never used in connection with a penal offense or with punishment as such, but only where the process is executory or coercive.

In 5 Criminal Law Magazine, in an exhaustive article on the subject of criminal contempts, citing numerous authorities, at pages 171 and 172 it is said:

"From the foregoing it will appear that there are two kinds of contempts—criminal contempts and remedial proceedings as for a contempt."

In many cases this distinction is statutory. For instance, the laws of Minnesota (2 Stat. at L., p. 229, sec. 22) provide for an order of commitment for any alleged contempt "or upon proceedings as for contempt to enforce the rights or remedies of any party."

The laws of Michigan (p. 1656, sec. 1) specify the cases in which parties may be punished by attachment, "as for contempt for non-payment of money."

"The revised statutes [of New York] distinguished and the civil code preserves the distinction between criminal contempts and proceedings as for contempt in civil cases."

The People *ex rel.* Negus *vs.* Dwyer, 90 N. Y., 406.

"In their notes on section 10 (5 Edmund's Stats., 426) the revisers say:

"'A solid and obvious distinction exists between contempts, strictly such, and those offenses which go by that name, but which are punished as contempts only for the purpose of enforcing some civil remedy. This distinction has been observed, and the former are intended to be included in the preceding sections.' . . . A further provision is made for the punishment of contempts in proceedings, as for contempts to enforce civil remedies and to protect the rights of parties in civil actions."

Sherwin *vs.* People, 100 N. Y., 258, 260.

"The provisions of the Revised Statutes relative to contempt are chiefly a summary of the common law upon that subject."

Pitt *vs.* Davison, 37 Barb., 107.

The People vs. Cowles, 4 N. Y., 38, was a proceeding in *habeas corpus*. The petitioner, for non-compliance with an order to pay money, had been committed to jail, to be held "in close custody until she should comply with said order." The Code provided that "if any person disobey an order of the judge or referee, duly served, such person may be punished by the judge as for contempt." And the question was whether or not the committal was *punishment for contempt*. If so, she was rightly committed to close custody; if not, she was entitled to the liberties of the jail; and, in delivering the unanimous opinion of the court upon this point, WOODRUFF, J., said:

"The distinction between a commitment upon a precept issued for the disobedience of an order for the payment of a sum of money and a commitment upon a conviction of mis-

conduct punishable by fine and imprisonment is very clearly indicated in the statute and has been repeatedly declared by the courts."

In the former case he says there is no "adjudication or conviction of misconduct nor anything in the nature of punishment imposed. The defaulting party is and can be subjected to no infliction punitory in its nature;" and in the latter that it is "an offense tending to impair the efficiency of our courts in the administration of justice, to bring them into disrespect, and it may in some of the cases embraced within the statutes be incidentally injurious to parties. The process in the former case is strictly and purely remedial. In the latter it is punitive, and in most instances purely so."

Many illustrative cases might be cited, but the following is curiously so:

In *The People ex rel. Hawley vs. Bennett*, 4 Paige, 281, the defendant was adjudged guilty of a contempt for breach of an injunction and fined $130, of which $24 was directed to be paid to the register and the remainder to the solicitor of the relators for his costs, and the question was whether this fine was imposed as a punishment for contempt under the section of the statutes providing therefor, or as for contempt to enforce civil remedies and to protect the rights of parties in civil actions. If the latter, the party was entitled to the jail liberties.

The chancellor held the $106 to be of this character, but that the $24 was a fine imposed as a punishment for contempt, and it therefore gave the relator the right to have the party confined within the walls of the prison.

In *Ex parte Hooson* (Law Rep., 8 Ch. App., 231) the issue was the power of a court of chancery to punish contempt for disobedience of an order to deposit money in its registry by imprisonment for nine months. The order of committal was made by a county judge, who had by statute all the powers and jurisdiction of the high court of chancery. The chief judge had reversed the order, and in affirming the order of reversal Lord Justice JAMES said:

The order to punish "on the face of it is wrong, for it is an absolute order of committal for contempt of court for non-payment of money. This is a penal sentence. The court of chancery never made an order in this form."

And he emphasises the statement by repetition, thus:

"The order of committal was such as had never been made by the court of chancery and was justly characterized by the chief judge as novel and surprising."

McDonald, had he remained within or returned to the jurisdiction of the court that ordered him to deposit the fund in controversy in its registry, could not have been punished by either fine or imprisonment for contempt of its authority. He could not have been punished by imprisonment, for a court of chancery never made an order in this form, and he could not have been fined.

"Every court of record may enjoin the people to keep silence under a pain and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt *in the face of the court*, as by giving opprobrious language to the judge or obstinately refusing to do their duty as officers of the court; but no English

court can fine for not appearing to answer a bill there; nor can a chancellor for breach of a decree."

1 Bacon's Abr., p. 226.

This of itself disposes of the whole foundation of the defense.

By all the authorities, contempt of a United States court is a specific criminal offense against the United States, and as McDonald had committed no such offense, how could he be punished? He might have been committed until he obeyed, but that would have been a mere process of debt.

"There can be no doubt," said Lord REDESDALE, "that the thing to be considered is not the form of the process, but the cause of issuing it. If the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as, for instance, disobedience of some order of the court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature."

McWilliams' case, 1 Sch. & Lef., 174.

This was a case of commitment for non-compliance with an order to pay money into court.

In *Harvey vs. Harvey*, 2 Ch. Div., 653, Mr. Justice CHITTY says:

"The distinction as to contempt for non-payment of money was recognized as long ago as the year 1797, when the case of *Ex parte Parker* (3 Ves., 554), cited in *McWilliams' Case* (1 Sch. & Lef., 169), was decided. In that case it was held that an attachment for non-payment of money was to be considered only as process to enforce payment of a debt and analogous to an execution."

How a Federal statute relating to punishment for contempt of a United States court can have any possible application to any proceeding, taken or proposed, as for contempt, to enforce a civil remedy as a common-law right, in the supreme court of the District of Columbia, exercising common-law jurisdiction, is yet to be explained, if explanation is possible.

Suppose the answer to have been struck out as punishment as for a contempt. It was but a legal fiction and wholly unnecessary except to make the record consistent, as suggested by Lord ELDON in *Sedgier vs. Tyte*, 11 Ves., 202. The defendants could not be heard upon the merits unless and until they had purged their contempt; and any suggestion that by discharging their solicitor and counsel and running away with the subject-matter of the suit instead of depositing it, and, in fact, abandoning the suit altogether, they could compel the court to waive their contempt, and itself to do for them what they could not do for themselves, seems too preposterous for argument.

II.

The act of March 2, 1831 (4 Stat., 287), is as follows:

"*An Act Declaratory of the Law Concerning Contempt of Court.*"

"*Be it enacted, &c.*, That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts in their official transactions, and the disobedience or resistance by

any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

SEC. 2. "*And be it further enacted*, That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate or impede any juror, witness or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense."

In the Revised Statutes the second section is now section 5399, under the caption of "crimes against justice," and the first section is embraced in section 725.

The first construction of this statute was by Mr. Justice BALDWIN, of this Court, sitting at circuit.

Ex parte Poulson, 19 Federal Cases, 1205, was a motion for a rule on Poulson, editor of a Philadelphia paper, to show cause why an attachment should not issue against him for a contempt of court in publishing an article severely reflecting upon the plaintiff and his witnesses in a cause then on trial before the court and a jury.

Mr. Justice BALDWIN said:

"The first inquiry is into the jurisdiction of this court to issue an attachment for contempt for a publication relating to a suit on trial or in any way pending before it.

"On March 2, 1831, Congress passed an 'Act declaratory

of the law concerning contempt of court,' the first section of which is as follows: [cited]. The history of this act, the time of its passage, its title, and provisions must be considered together to ascertain its meaning and true construction.

"It was enacted shortly after the acquittal of Judge Peck, of Missouri, on an impeachment preferred against him for issuing an attachment against a member of the bar for making a publication in relation to a suit which had been decided by that judge. On the trial the law of contempt was most elaborately examined by the learned managers of the House of Representatives and the counsel for the judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause during its pendency, and all admitted its illegality when done while the cause was on trial. It had too often been exercised to entertain the slightest doubt that the courts had power, both by the common law and the express terms of the judiciary act, as declared by the Supreme Court, to protect their suitors by the process of attachment.

"With this distinct knowledge and recognition of the existing law, it cannot be doubted that the whole subject was within the view of the legislature, nor that they acted most advisedly on the law of contempt, intending to define in what cases the summary process of the courts should be exercised and to confine it to the specified cases.

"The second section of the same law is in further confirmation of the view taken of the first section. It is a clear indication of the meaning of the law, that the misbehavior which may still be punished in a summary manner does not refer to those acts which subject a party to an indictment. Taking the two sections together, the law admits of only one construction. The first alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise,

tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business; not to any attempt to influence, intimidate, or impede a juror, witness, or officer in the discharge of his duty in any other manner whatever. . . . Judges and jurors can perform their functions on the bench and in the box by confining their attention to the law and evidence. Disorder may be repressed in their presence or hearing in a summary manner, but after an adjournment no attachment can be issued for anything done out of court during the intermission of its actual session. . . . The rule must be refused."

The same construction has been given to the act by this Court.

In *Ex parte Robinson*, 19 Wall., 510, 511, Mr. Justice FIELD, speaking for the Court, said:

"The act of 1831 is to them (circuit and district courts) the law specifying the cases in which summary punishment for contempts may be inflicted."

The history of this act shows that these eminent jurists have attached no undue importance to the term "summary punishment." It is the key-note to those impeachment proceedings. For instance, Mr. Buchanan, the leading manager on the part of the House, in his argument at the impeachment trial, said:

"That the circumstances were amply sufficient to show a criminal intent on the part of Judge Peck in the summary punishment of Mr. Lawless; that the infliction upon him of a summary and cruel punishment for having written an article decorous in its language was itself sufficient to prove

the badness of the motive; that the courts had no right to punish as a contempt in a summary way libels, even in pending cases."

Congressional Debates, vol. VII, pp. 40, 41.

The New York court seems to have utterly ignored these two qualifying and most important words: "as," in the record, and "summary," in the law.

H. B. TITUS,
Of Counsel for Appellant.

167-409

JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 255.

CHARLES E. HOVEY, As Survivor of William P. Dole, Plaintiff in Error,

vs.

GEORGE ELLIOTT and GEORGE L. ELLIOTT, As Executors, etc., of John Elliott, Deceased.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR ON THE QUESTION WHETHER THE WRIT OF ERROR IN THIS CASE SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Everett P. Wheeler,
A. S. Worthington,
Attorneys for the Plaintiff in Error.

Judd & Detweiler, Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 255.

CHARLES E. HOVEY, As Survivor of William P. Dole, Plaintiff in Error,

vs.

GEORGE ELLIOTT and GEORGE L. ELLIOTT, As Executors, etc., of John Elliott, Deceased.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief for the Plaintiff in Error on the Question Whether this Writ of Error Should be Dismissed for Want of Jurisdiction.

No motion was made to dismiss the writ in this case for want of jurisdiction, nor did counsel for the defendants in error, either in his brief or in the oral argument, suggest that it should be dismissed; but during the closing argument on behalf of the plaintiff in error a doubt on this point was intimated by some members of the Court. Accord-

ingly, by leave of the Court, we now file this additional brief, in which we present our views on this question.

We understand the suggestion from the bench to be that, though a Federal question would have been involved if the court of appeals of New York had held the decree of April 17, 1878, to be altogether void as against McDonald and White, there may be no such question, because in its opinion the court of appeals say that Riggs & Company, as purchasers *pendente lite*, did not assume the risk of any punishment that might be inflicted upon McDonald and White *in an independent proceeding*, and that "*as to Riggs & Company* the judgment is void." The inquiry, then, is whether this Court has jurisdiction to review the judgment of a State court, holding the decree of a court acting under the authority of an act of Congress to be void not as to the defendant of record, but as to a person who *pendente lite* has purchased the property involved in the suit—the State court resting its judgment upon the ground that the purchaser *pendente lite* was not a party to the proceeding in which the final judgment was rendered, although in fact he was such party.

To a clear understanding of this question it is necessary, first, to see just what are the statutes governing the jurisdiction of the Court in such cases as this.

Section 2 of the act of February 5, 1867 (14 Stat., 386), which took the place of section 25 of the judiciary act of 1789 (1 Stat., 85), provides:

"That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of * * * an authority exercised under the United States, and the decision is against their validity, * * * or *where any title, right*, privilege or immunity *is claimed under* the Constitution, or *any* treaty or *statute of*, or commission held, *or authority exercised, under the United States*, and the decision is

against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

This section has been carried into section 709 of the Revised Statutes of the United States.

Section 905 of the Revised Statutes is as follows:

"The acts of the legislature of any State or Territory, or of *any country subject to the jurisdiction of the United States*, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. *The records and judicial proceedings of the courts of* any State or Territory, or of *any such country*, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. *And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.*"

This section is taken from the acts of May 27, 1790 (1 Stat., 122), and March 27, 1804 (2 Stat., 299).

This Court, in Dupasseur *vs.* Rochereau, 21 Wall., 130–134, held that under section 709 a writ of error lies to a State court to review its decision when it has refused to give due effect to a judgment of a court of the United States. In that case a Federal court in Louisiana, at the suit of a vendor of land against his vendee, had established the vendor's privilege as a first lien on the land. In another suit in a court of that State it was held that the judgment in the Federal court did not affect the rights of the holder of a prior mortgage who was not a party to the first suit. The decree of

the State court being brought here for review, the inquiry arose whether this Court had jurisdiction—whether any Federal question was involved. Mr. Justice Bradley in delivering the opinion of this Court says:

"Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute and with jurisdiction of the case and the parties a question is undoubtedly raised which, under the act of 1867, may be brought to this Court for revision. *The case would be one in which a title or right is claimed under an authority exercised under the United States and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction*, and hence it would be within the judicial power of the United States, as defined by the Constitution, and it is clearly within the chart of appellate power given to this Court over cases arising in and decided by the State courts.

"The refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, to wit, the first section of article four, and the right to bring such a case before us by writ of error under the twenty-fifth section of the judiciary act [sec. 905, R. S.] or the act of 1867 [sec. 709, R. S.] is based on the refusal of the State court to give validity and effect to the right claimed under that article and section.

"In either case, therefore, whether the validity or due effect of a judgment of the State court or that of a judgment of a United States court is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this Court."

This was the first case in which the right of this Court to review the judgment of a State court refusing to give due effect to a judgment of a Federal court was involved, and it will be seen that the situation was precisely what it is in the case at bar. The State court had held that the judgment of the Federal court was not binding upon one *who was not a party to the suit*. The losing party in the State court

claimed that under the laws of Louisiana the judgment of the Federal court was binding against one who held a mortgage prior in date to his own lien, whether he was a party to the suit or not, and to determine whether the State court had erroneously decided against that claim this Court issued its writ of error and maintained its jurisdiction.

Next comes the case of Embry *vs.* Palmer, 107 U. S., 3, in which this Court reviewed and reversed the judgment of the supreme court of Connecticut, which held that a judgment obtained in an action at law in the supreme court of the District of Columbia was void because it had been obtained by fraud. In that case this Court followed Dupasseur *vs.* Rochereau, *supra*, saying:

"The jurisdiction of the court invoked by this writ of error is conferred by section 709, Rev. Stat., *it being a case in which a title or right is claimed under an authority exercised under the United States*, and the decision of the State court being in denial of the title or right so asserted. It was decided in Dupasseur *vs.* Rochereau, 21 Wall., 130, that such a question is undoubtedly raised whenever 'a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and of the parties.' The judgment, which is the subject-matter of the litigation, is that of the supreme court of the District of Columbia, which is a court of the United States. The question we have to determine is whether the supreme court of errors of the State of Connecticut, in the decree complained of, gave to that judgment its due effect."

This Court then recites the provisions of section 905 of the Revised Statutes and proceeds as follows:

"As part of its general authority the power [of the general government] to give effect to the judgments of its courts is co-extensive with its territorial jurisdiction. That the supreme court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress. Accordingly, the judgments of the courts of the United

States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced."

In the later case of Dowell *vs.* Applegate, 152 U. S., 327, the supreme court of Oregon held that Dowell, who had purchased land in that State at a sale made in conformity with a decree of a circuit court of the United States, took no title. This Court reviewed and reversed the judgment of the State court. Mr. Justice Harlan, in delivering the opinion, after reciting the fact, said that it became necessary to inquire:

"*First*, whether the decree and proceedings in the Federal court were, as claimed, void for the want of jurisdiction to hear and determine the suit which was instituted by Dowell in the circuit court of Douglass county, Oregon, and was subsequently removed into the circuit court of the United States for the district of Oregon.

"*Secondly*, whether, if such decree and proceedings were not void, the State court gave due effect to them when adjudging that Dowell took nothing by his purchase of the lands in dispute under that decree.

"If these questions be determined in favor of Dowell, *then the judgment below was erroneous in that it denied a right specially set up and claimed by him under the authority of the United States.*"

Both these questions were decided in favor of the plaintiff in error, and the judgment of the State court was reversed. The controversy, it will be seen, was between the purchaser under the decree in the Federal court and one who claimed title adversely to that decree. It is true that in this case Dowell, the purchaser, was also a party to the suit, but his claim in the case in the State court involved his rights as purchaser only.

We have now examined the three cases in this Court in which it is held that this Court has jurisdiction to review the judgment of a State court denying the validity of, or refusing to give due effect to, the judgment or decree of a court created by an act of Congress, and we have seen that in two out of the three cases were involved the rights of those who either were not directly parties to the controversy in the Federal court or did not acquire the rights in dispute as such parties.

A case presenting a still more striking resemblance to the case at bar is Chew *vs.* Brumagen, 13 Wall., 497. In that case one Walker, the owner of a bond and mortgage, assigned them to one Wood as collateral security for a debt. Wood, as such assignee, brought suit on the bond in the supreme court of New York against Chew, the obligor. He attempted to make Walker also a defendant, but failed to get him into court, and the case proceeded against the obligor alone. The latter pleaded fraud in the transaction, and succeeded in obtaining on that account a substantial reduction of the mortgage debt. The balance which was found due from him he promply paid. But while the suit was pending Wood, the plaintiff, assigned the bond and mortgage to one Braisted, and Braisted and the administratrix of Walker, the original owner of the mortgage, joined in assigning them to one Brumagen. Brumagen filed a bill in New Jersey, where the land lay, to foreclose the mortgage. The mortgagor, Chew, set up the proceedings in the suit in New York as a defense and claimed that the mortgage was satisfied. The chancellor of New Jersey, however, held that the mortgagor was entitled to credit only for the amount which he had actually paid on the New York judgment for the reason that the obligee, Walker, was not a party to the New York suit. This ruling of the chancellor was affirmed by the court of errors

and appeals of New Jersey. Thereupon the mortgagor, Chew, sued out a writ of error and brought the case here for review. This Court unanimously held that the proceedings in the New York suit were valid, and the decree below was reversed. The New Jersey courts had held that by the statutes of New York the first assignee, Wood, did not represent Walker, the original obligee, and that therefore the deduction which the New York court had made from the mortgage debt by way of set-off was not binding on Walker and those claiming under him; but this Court, upon a careful review of those statutes and of the decisions of the New York courts construing them, came to a different conclusion and remanded the case, with directions to dismiss the bill. In that case there was no contention that the judgment in New York was not conclusive as to the parties to it, the whole controversy being as to its effect upon the rights of one who had never been made a party.

In view of these decisions in this Court it seems to us impossible to successfully contend that even if the court of appeals of New York had done no more than to hold that *Riggs & Company* are not bound by the decree of April 17, 1878, its judgment would not be subject to review by this Court. If the fact be that in the place where the judgment of a Federal court is rendered it is binding upon a person who does not appear on the record of the case to have been a party, then the refusal to give it effect against such person is a denial of a right claimed under the Constitution and statutes of the United States and under an authority exercised thereunder, and is a refusal to give due faith and credit to such judgment.

But it is a misuse of terms to say that a purchaser *pendente lite* is not a party to the record. Nominally he is not; but for all practical purposes he is. We need not refer to

authorities on a proposition so fundamental, but it may be useful in this connection to consider the language of some of the decisions of this Court showing the extent to which this principle goes.

In Tilton *vs.* Cofield, 93 U. S., 168, in which property that had been attached in a pending suit was purchased by one not a party to the suit, it was said:

"There is another objection to the case of the appellees, which must not be overlooked. They are not subsequent attaching creditors, not creditors at all; they are purchasers *lite pendente*. The law is that he who intermeddles with property in litigation does it at his peril, *and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset* (Inloe's Lessee *vs.* Harvey, 11 Md., 524; Salsbury *vs.* Benton, 7 Lans., 352; Harrington *vs.* Slade, 19 Barb. S. C., 162; 1 Story's Eq., sect. 406). The appellees voluntarily took the position they occupy. They chose to buy a large amount of property, including that in controversy, from the fugitive debtor. This was done after the latter had been seized under the writ of attachment and while the suit in which it was issued was still pending. They took the title subject to the contingencies of the amendments that were made and of everything else, not *coram non judice*, the court might see fit to do in the case. The attachment might be discharged or the judgment might be larger than was then anticipated. They took the chances and must abide the result. *Having obtruded themselves upon the property attached, they insist that their purchase narrowed the rights of the plaintiffs and circumscribed the jurisdiction of the court. Such is not the law.*"

In *Ex parte* Railroad Company, 95 U. S., 221–226, a defendant holding railroad bonds secured by mortgage, the priority of which over another mortgage was in question, had assigned all its interests in the subject-matter of the suit before the final decree was rendered. Here it was contended that the company, which had so assigned all its rights, had no further interest in the suit, and could not therefore appeal; but this Court said:

"It is well settled that an assignment by a defendant of his interest in a litigation does not necessarily defeat a suit. His assignee taking *pendente lite* is bound by what is done against him. *The assignee may, at his own election, come in by an appropriate application and make himself a party, so as to assume the burden of the litigation in his name, or he may act in the name of his assignor.* A *pendente lite* assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned. Of this the plaintiffs in the action may not complain, *because the assignee is bound by all that is done, whether a party by name or not.*"

Even where an interest in property involved in a pending suit in a State court was acquired, not by an assignment, but by a judgment recovered in a Federal court, it was held that the final decree in the State court bound those who had acquired their interest through the proceedings in the Federal court. (Stout *vs.* Lye, 103 U. S., 66.)

The same rule has been applied where pending the suit one of the parties becomes bankrupt and his interest is transferred to his assignee in bankruptcy. In such a case this Court said:

"We have already said, and no authority is necessary to sustain the proposition, that a sale and conveyance by the mortgagor pending the suit would not prevent the court from proceeding with the case without the purchaser, nor affect the title of him who bought under the decree. So, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these transfers. Another reason is that when such a suit is ended by a final decree transferring the title, that title relates back to the date of the instrument on which the suit is based or to the commencement of the suit, and the court will not permit its judgment or de-

cree to be rendered nugatory by intermediate conveyances. We see no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding."

Eyster *vs.* Gaff *et al.*, 91 U. S., 521–524.

Walden *vs.* Bodley's Heirs, 9 How., 49, is an important case on this subject. Referring to persons who had purchased land *pendente lite*, the Court said: "*It was a decree in effect against these parties.*"

In Scotland County *vs.* Hill, 112 U. S., 183–185, it appeared that in a suit in a State court in Missouri the object of which was to have certain *negotiable* county bonds which had been issued to a railroad company held void—the county officers and the railroad company being the only defendants—certain of the bonds had been sold while the suit was pending, and Chief Justice Waite, in delivering the opinion of this Court in that case, said:

"It has never been doubted that those who buy such securities from litigating parties with *actual* notice of the suit do so at their peril and must abide the result, the same as the parties from whom they got their title."

When that case came to this Court a second time Mr. Justice Harlan, in delivering the opinion of the Court, quoted and reaffirmed this language. (Scotland County *vs.* Hill, 132 U. S., 107–114.)

There are many cases in which persons other than purchasers *pendente lite* are bound by the judgment in a suit to which they are not parties. Thus, holders of railroad bonds secured by a mortgage are bound by a decree in a suit to which the trustees under the mortgage are parties (Beals *vs.* R. R. Co., 133 U. S., 290); stockholders in a corporation are bound by a decree against the corporation requiring it to levy an assessment upon the stockholders (Hawkins *vs.* Glenn, 131 U. S., 329; Glenn *vs.* Liggett,

135 U. S., 533); and the sureties upon a replevin bond given in a State court are bound in a suit against them on the bond in a Federal court by an adjudication against their principal in the proceedings in the replevin suit in the State court (Washington Ice Co. *vs.* Webster, 125 U. S., 426–444). Can it be the law that when it is sought to enforce in the courts of another jurisdiction a judgment of this kind against a bondholder, stockholder, or surety, and such court erroneously holds the judgment to be void as to him, there is no redress here? In the very case of Windsor *vs.* McVeigh, 93 U. S., 274, upon which opposing counsel place so much reliance, the parties in the State court were the original owners of the land and the grantees of the purchaser at a sale made under the decree of the Federal court.

We may reach a proper decision in this case by another train of reasoning.

The main object of the suit against McDonald and White in the District of Columbia was to establish and enforce a lien on the part of Hovey upon McDonald's claim. After the fund, by consent of all the parties, had been paid to the receiver the right to the fund in court was the main, if not the only, question involved in the case. The consent order under which the money was paid into court is dated February 16, 1875 (Rec., pp. 60, 61). In the amended bill, which was filed subsequently—in April, 1875—the plaintiffs, after praying that the fund might be retained by the court until the final determination of the cause, besides praying for general relief, asked specifically that their interest and right to receive that fund might be decreed by the court. (Rec., pp. 20, 21.)

The final decree of April 17, 1878, established a lien in favor of the complainants upon the claim of McDonald

"and upon any draft, money, evidence of indebtedness, or proceeds thereof." (Rec., pp. 57, 58.)

Riggs & Company, having purchased in the meantime the District of Columbia bonds, which constituted the fund in court when the amended bill was filed, this final decree, if it had any effect whatever, established a lien in favor of Hovey and Dole on those bonds or the proceeds thereof in the hands of Riggs & Company; and the present suit was brought, as stated in the opening sentence of the opinion of the court of appeals of New York (Rec., p. 130), "to have the defendants' testator adjudged to be a trustee of certain bonds for the benefit of the plaintiffs, and that they have a lien thereon, and that the defendants account to them therefor."

The object of the plaintiffs, therefore, in the present action was solely to enforce a right which it was the principal object of the suit in the District to establish and which by the final decree of the supreme court of the District was established. It has been adjudged by the court below that that right does not exist, because the decree as to Riggs & Company is void. If that decree, by the laws in force in the District of Columbia, was not void there as against Riggs & Company, then a Federal question is raised both under section 709 of the Revised Statutes, because the plaintiffs claimed a right and title under a statute of, and authority exercised under, the United States and the decision is against that right and title, and under section 905, because, to their injury, there has been denied to the records and judicial proceedings of a court of a country subject to the jurisdiction of the United States—to wit, the supreme court of the District of Columbia—such faith and credit as is given to such records and proceedings in the courts of that country.

The question which we are here considering is not one which affects these parties alone, nor is it a question as to the effect to be given to the judgments and decrees of the courts of the District of Columbia solely. The law which is to be laid down in this case as to the right of this Court to review the judgment below will apply whenever the final judgment of a State court has been denied due faith and credit, either in the courts of another State or in the courts of the United States, as against those who are bound thereby as privies to a party to the record. It will apply, too, whenever the decision of any court existing under the Constitution and laws of the United States is held void as to parties not named in the record by the courts of any State. If, for the reasons set forth in the opinion of the court of appeals of New York in this case, the decree of April 17, 1878, is void as to Riggs & Company, then under similar circumstances a judgment of the Supreme Court of the United States might safely be held void wherever it was sought to enforce it against one who had become the purchaser *pendente lite* of the property involved in the suit. As was said by Chief Justice Marshall in Voorhees *vs.* Bank of the United States, 10 Pet., 474:

"If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments or processes would not be exempted."

If this were a hard case against the defendants in error, they could not reasonably expect the rules of law to be strained in their favor so as to lead to such results as are here indicated; but they have no one but themselves to blame for the position they are in.

The bonds which they purchased were payable to Mr. Riggs as receiver. When he endorsed them as receiver and

turned them over to McDonald pursuant to the order of June 24, 1875, his liability was at an end. On the same day, however, and evidently as a part of the same transaction, the firm of Riggs & Company, of which he was a member, took back these bonds from McDonald, paying the latter full value for the same. Riggs & Company then surrendered the bonds to the Treasury Department and took in lieu thereof other bonds payable to themselves. If McDonald had attempted to sell the bonds to somebody else or had taken them to the Treasury to have them converted into bonds payable to himself, the authority under which the receiver had endorsed them over to him would have been inquired into. It would have been found that an appeal was pending from Judge Wylie's order, and McDonald would have found it impossible to dispose of the bonds. It was the case of a purchase of property involved in a lawsuit by one who had actual notice of the litigation under circumstances which suggested future trouble and required the utmost caution.

Hovey and Dole were prompt and vigilant in the enforcement of their claim in the proceedings in court, both in the special and the general term. Hence it is a situation, often occurring, where when one of two innocent parties must suffer a loss it should be borne by him from whose carelessness it has resulted. That he acted in good faith is no defense.

We have considered this matter in accordance with what we understand to be the suggestion from the bench, as though the opinion of the court below in this case might be held to indicate that its judgment rests solely upon the proposition that the decree of April 17, 1878, is void only as to Riggs & Company. But we respectfully submit that that opinion is not capable of such a

construction, and that, taken altogether, it is clear that the Court has held that the decree of April 17, 1878, is entirely null. But, however that may be, we submit that the plaintiff in error is entitled to have this Court say whether that decree was a final disposition of the case in which it is entitled or was entered in another case, and whether the court in general term, in holding that it was not bound to listen to the defendants while they defied its authority, erred so grossly that their decree may be treated as waste paper by any justice of the peace in the land.

If it was a decree in another and independent case, then the *civil* suit of Hovey and Dole against McDonald and White in the supreme court of the District of Columbia, No. 3937, equity docket 14, is still pending in that court ready for final hearing upon bill, answer, and proofs. As to these questions, we submit the case upon the briefs already on file.

EVERETT P. WHEELER,
A. S. WORTHINGTON,
Attorneys for Plaintiff in Error.

167-409

FILED
MAR 29 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 255.

CHARLES E. HOVEY, PLAINTIFF IN ERROR,

vs.

GEORGE ELLIOTT AND GEORGE L. ELLIOTT,
EXECUTORS, &C., DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE DEFENDANTS IN ERROR.

JOHN SELDEN,
Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Synopsis of Points and Authorities.

I. *Decree of April* 17, 1878, *if valid in itself, not binding upon defendants below.* (*Post*, pp. 34–47.)

1. The decree was rendered, not in determination of that *lis* which was *pendens* at the time of the purchase of the bonds, but in culmination of the subsequent and particular proceedings for contempt, conducted against McDonald and White. (*Id.*, pp. 34–44.)

2. The decree was not "pronounced upon the merits of the controversy." (*Id.*, pp. 44–45.)

3. The operative *cause* of the decree was the contempt of McDonald and White, and not the existence, in equity, of the lien. (*Id.*, pp. 43–47.)

II. *If the Supreme Court of the District of Columbia transcended its authority in rendering the decree in question, the same is not merely erroneous, but absolutely void.* (*Id.*, pp. 47–54.)

1. Limitations upon the powers of courts of justice. (*Id.*, pp. 47–49.)

2. Question of jurisdiction always examinable, *collaterally*. (*Id.*, pp. 50–51.)

3. *In the Courts of the United States, jurisdiction over the subject-matter and the parties, does not constitute the test of jurisdiction to render given judgments, or decrees.* (*Id.*, pp. 51–54.)

Did the Supreme Court of the District of Columbia transcend its authority in rendering the decree in question? (*Id.*, *p.* 54.)

III. *The decree against McDonald and White punished them for contempt, by denying them a hearing, contrary to the laws of the United States.* (*Id.*, pp. 54–78.)

1. In what sense, *denial of a hearing* is here intended. (*Id.*, pp. 54–55.)

2. Powers of Courts of United States to punish contempts, *limited, by statute, to fine or imprisonment.* (*Id.*, pp. 55–59.)

(*a.*) Origin of, and observations upon, the powers of the Federal Courts to punish for contempts. (*Id.*, pp. 55–57.)

(*b.*) Of the Judiciary Act of 1789, section 17, and Revised Statutes of the United States, section 725. (*Id.*, pp. 58–59.)

(*c.*) Within the meaning of this legislation, the Supreme Court of the District of Columbia is a court of the United States. (*Id.*, pp. 59–64.)

(*d.*) *Though the Supreme Court of the District be not a Court of the United States, the section in question is still operative upon the local judiciary, at the seat of Government.* (*Id.*, pp., 64–67.)

(*e.*) Construction placed, by Federal tribunals, upon Judiciary Act of 1789, section 17. (*Id.*, pp. 67–69.)

(*f.*) Though, in the Federal courts, the exercise of the power to punish for contempts, has a twofold object, *the limits of the punishment itself are fines or imprisonments.* (*Id.*, pp., 69–70.)

3. The plea of *circumstances*, unavailing. (*Id.*, pp. 70–72.)

4. *The decree in question, derives no support from any law of Maryland in force in the District of Columbia.* (*Id.*, pp. 72–78.)

(*a.*) How far the laws of Maryland have been continued, by Congress, in force in that District. (*Id.*, pp. 72–74.)

(*b.*) Of *the common law*, in Maryland, relating to contempts. (*Id.*, pp. 74–75.)

(*c.*) In the Supreme Court of the District of Columbia, *law* and *equity* are distinct systems, and the proceedings against McDonald and White were conducted, not upon the *law* side, but upon the *equity* side, of that court. (*Id.*, p. 75.)

(*d.*) The Maryland statutes, in force in the District of Columbia, lend no justification to the proceedings conducted against McDonald and White. (*Id.*, pp. 75–76.)

(*e.*) The Maryland Declaration of Rights, adopted in the District of Columbia, is prohibitory of such proceedings. (*Id.*, p. 76.)

(*f.*) Interlocutory orders and decrees, in that District, enforced, when disobeyed, *only by fine, or imprisonment.* (*Id.*, pp. 77–78.)

IV. *The proceedings and decrees had against McDonald and White, cannot be viewed as merely civil proceedings.* (*Id.*, pp. 78–92.)

1. The proceedings were conducted under motion *for punishment*, and the decree must be construed with reference to the object thus sought. (*Id.*, pp. 79–80.)

2. The proceedings and decree, in order to be regarded *as civil*, must be civil, not merely in form, but *in substance and effect*. (*Id.*, pp. 80-82.)

3. *Of the punitive purpose, as well as the punitive nature, in fact*, of the proceedings against McDonald and White. (*Id.*, pp. 82–88.)

(*a.*) *Résumé* of proceedings. (*Id.*, pp. 82, 85.)

(*b.*) The effect of removing the answer, *for contempt*, was *punishment, by denial of right to be heard*, because of contempt. (*Id.*, pp. 85–87.)

4. Disobedience of judicial orders known, in practice, to courts, only through action of officer, or party charged with, or interested in, performance. (*Id.*, pp. 88–92.)

(*a*). Interest of party in punishing—object he may have in prosecuting—the contempt—cannot vary limits assigned by law to the punishment of the contempt. (*Id.*, p. 88.)

(*b*). Punishment need not be inflicted solely for public benefit. (*Id.*, p. 88.)

(*c*). Illustration of position last above, in cases of *fines*. (*Id.*, pp. 88–90.)

5. Differences in State laws and practices, in proceedings for contempt. (*Id.*, p. 91.)

6. *Civil* contempts, in District of Columbia, without precedent. (*Id.*, p. 91.)

7. Course of Federal decision upon consequences and nature of contempts, and upon the remedies therefor. (APPENDIX C, pp. 164–167.)

Fines imposed by United States Circuit Courts, for disobedience of injunctions, *in Patent Cases*, though directed to be paid to parties injured by disobedience to the injunctions, *punishments*, upon weight of Federal authority. (APPENDIX C, pp. 164–177.)

V. The proceedings against McDonald and White are unlawful, when viewed merely as civil remedies. (*Id.*, pp. 93–146.)

General position, *that judicial power can will nothing*, and is *but the power of the law*, applied to the administration of civil remedies for contempts. (*Id.*, pp. 93–94.)

The fifth Amendment to the Constitution provides that no person shall be "deprived of life, liberty or property, *without due process of law.*" (*Id.*, p. 94.)

Power of national courts, restricted by this Amendment, and their judgments, or decrees, in violation of it, *nullities.* (*Id.*, pp. 94–95.)

1. "*Due process of law*" *involves and implies the right to be heard.* (*Id.*, pp. 96–98.)

(*a.*) The "*law*" here intended, is one which *hears before it condemns*, which *proceeds upon inquiry*, and which *renders judgment only after trial.* (*Id.*, pp. 96–98.)

(*b.*) *Due process of law, upon proceedings for contempt, allows no deprivation of property, without hearing and inquiry.* (*Id.*, pp. 98–99.)

(*c.*) In what manner McDonald and White were deprived of the benefit of such law. (*Id.*, pp. 99–100.)

(*d.*) Of the inseparable connection, in the Federal judicial system, *between the liability to suit and the right of defense.* (*Id.*, pp. 100–103.)

2. *Due process of law imports, under Federal decision, compliance with established methods of procedure.* (*Id.*, pp. 103–106.)

Cases, under this topic, and conclusion drawn from them. (*Id.*, pp. 103–107.)

3. *The customs, usages and settled course of procedure, in the State tribunals, in general, lend no countenance to the proceedings conducted in the Supreme Court of the District of Columbia, against McDonald and White.* (*Id.*, pp. 107–108.)

(*a.*) State authorities, upon this head, collected and arranged. (*Id.*, pp. 108–116.)

(*b.*) Rather than render judgment without inquiry, State Courts have sometimes extended *privileges* to defendants in contempt, and aided them in interposing or completing defenses. (*Id.*, pp. 116–120.)

4. *There is no Federal adjudication which supports these proceedings.* (*Id.*, p. 120.)

5. *In the absence of particular statute, or rule, the jurisdiction and practice, in equity, of the national tribunals, in general, including the Supreme Court of the District of Columbia, are in analogy to the jurisdiction and practice which were known to the High Court of Chancery in England.* (*Id.*, p. 120.)

(*a.*) The judicial power of the Union, extended to "cases in *law* and *equity*." (*Id*, p. 120.)

(*b.*) The modes of proceeding, in suits in equity, in the Circuit and District Courts of the United States, are required, by acts of Congress, to be according to the principles, usages and rules of *equity*, as distinguished from law, subject to alterations or additions by those courts, or to rules prescribed by *this* Court, and the equity here intended is that of the English Chancery system. (*Id.*, p. 121.)

(*c.*) Of the rules of Equity Practice prescribed for the Circuit Courts of the United States, by *this* Court, and of the adoption, by such rules, in cases where they do not apply, of the practice of the recent High Court of Chancery in England. (*Id.*, pp. 122–124.)

(*d.*) Of the *equity* jurisdiction, practice and Rules of the Supreme Court of the District of Columbia, and of the adoption, by such Rules, in cases where they do not apply, of the practice of the recent High Court of Chancery in England. (*Id.*, pp. 124–126.)

(*c.*) Neither the Equity Rules prescribed by *this* Court nor those established by the Supreme Court of the District of Columbia, deal with the subject of contempts, except by the implication contained in certain provisions for *attachment, sequestration and the writ of assistance.* (*Id.*, pp. 126–127.)

6. In the High Court of Chancery in England a defendant, though in contempt, might resist, as of right, *any proceeding taken against him by his adversary.* (*Id.*, p. 127.)

(*a.*) *A fortiori*, his previous contempt could not there deprive him of the right of so far passively resisting the entry of final decree against him, *as to have some judgment and consideration by the Court, upon his case as actually presented and closed upon pleadings and proofs.* (*Id.*, p. 127.)

(*b.*) Observations upon the rights of parties in contempt under the course of practice in the English Chancery. (*Id.*, pp. 127–129.)

(*c.*) *Of the 78th Ordinance of Lord Bacon.* (*Id.*, pp. 129–130.)

(*d.*) The true construction of this order, deduced from cases in the English Chancery, upon contempts. (*Id.*, pp. 130–144.)

7. Of the absence of all necessity for such proceedings and decrees as were actually taken and rendered against McDonald and White. (*Id.*, p. 145.)

VI. Of the practice in the courts of New York, in proceedings for contempt. (*Id.*, pp. 147–150.)

Equity jurisdiction and practice of Federal courts, not determined, however, by State decisions. (*Id.*, p. 150.)

Of the litigations arising out of the award to *McDonald* and over the proceeds thereof. (*Id.*, p. 151.)

APPENDIX A.

(*Post*, pp. 71, 153.)

(1.) *Contempts*, in Federal tribunals, *punishable under information or indictment.* (*Id.*, p. 153.)

(2.) *Apprehension* of fugitive contemnors, under the laws of the United States. (*Id.*, p. 154.)

APPENDIX B.

AS TO CERTAIN STATUTES OF MARYLAND.

(*Post*, pp. 76, 155.)

1. Fine and imprisonment, in Maryland, for contempt of *interlocutory* orders and decrees. (*Id.*, pp. 155–156.)

2. *Attachment, commitment, sequestration*, and the like, in Maryland, for the enforcement of *final* decrees. (*Id.*, pp. 157–158.)

3. *Decree pro confesso*, in Maryland, *for non-appearance, after summons.* (*Id.*, pp. 158–159.)

4. *Judgments by default, at law,* against defendants, for *non-production of books and other writings.* (*Id.*, pp. 160–163.)

(*a.*) Under Acts of Maryland. (*Id.*, p. 160.)

(*b.*) Under Judiciary Act of 1789, section 15, and the practice thereunder, in the District of Columbia. (*Id.*, pp. 160–161.)

(*c.*) The origin and *rationale* of judgments by default, *at law,* against defendants refusing to produce books or writings. (*Id.*, pp. 161–163.)

(*d.*) Similar defaults authorized, under the laws of New York and of other of the States. (*Id.*, p. 163.)

APPENDIX C.

(*Post*, pp. 164–177).

Of the payment of fines imposed by the Circuit Courts, in Patent Cases, for contempts of interlocutory injunctions, unto the parties injured by such contempts. (*Id.*, pp. 164–166.)

(*a.*) *Of the punitive nature,* nevertheless, of such fines. (*Id.*, p. 166.)

(*b.*) Of the difference in views entertained upon the Circuits, in respect to the enforcement of *civil remedies, through punishments for contempt.* (*Id.*, pp. 166–168.)

(*c.*) Of the total absence of claim, upon every Circuit, *that contempts may be punished* OTHERWISE THAN BY FINE OR IMPRISONMENT, as provided in Revised Statutes United States, section 725, *for the purpose of affording, or enlarging, any civil remedy.* (*Id.*, pp. 169–173.)

Of the decisions of this Court upon proceedings for contempt. (*Id.*, p. 173.)

(*a.*) Texas *vs.* White, 131 U. S., Appendix XCV.
In re Paschal, 10 Wall., 491.
(*Post*, p. 173.)

(*b.*) Worden *vs.* Searles, 121 U. S., 14.
(*Post*, pp. 174–177.)

APPENDIX D.

(*Post*, pp. 178–181.)

Of WARTMAN *vs.* WARTMAN, *Tan. Dec.*, 362.
(*Post*, pp. 178–181.)

Appendix E.

(*Id.*, pp. 182–186.)

Of the removal of Answers from the files, for contempts, in Divorce Cases.

1. Of the text of Mr. *Bishop*, upon this subject. (*Id.*, pp. 182–183.)

2. Of the absence of any such practice in England. (*Id.*, pp. 183–184.)

3. Of the law, upon this subject, in Georgia. (*Id.*, pp. 184–185.)

4. Of the refusal of the Iowa judiciary to follow the practice adopted in New York. (*Id.*, pp. 185–186.)

5. Of the general course of practice in the State tribunals, in respect to the non-payment of alimony. (*Id.*, p. 186.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 255.

CHARLES E. HOVEY, PLAINTIFF IN ERROR,

vs.

GEORGE ELLIOTT AND GEORGE L. ELLIOTT,
EXECUTORS, &C., DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE DEFENDANTS IN ERROR.

Statement of the Case.

This was an action brought, on April 16, 1884, about thirteen years since, in the superior court of the city of New York, by *Hovey*, the present plaintiff in error, and one *Dole*,

who is now deceased, against *John Elliott*, of that city, who, also, is now deceased, and of whose will the defendants in error are executors, and against *Glover*, *Hyde* and *Kieckhoefer* (the last three being neither served with process in the action, nor appearing thereto), as surviving partners of the banking firm of *Riggs & Co.*, upon a certain decree rendered by the supreme court of the District of Columbia, on April 17, 1878, in favor of *Hovey* and *Dole*, against one *McDonald* and one *White*, for the sum of $49,297.50, in gold, with lawful interest thereon from the date of the decree, (the whole, on April 17, 1897, amounting to $105,496.65,) and declaring the existence of *a lien*, in favor of Hovey and Dole, for said sum, with such interest, *upon certain bonds*, which the complaint filed in the New York action, claimed to have been involved in the suit wherein said decree was rendered, which, as was also claimed in such complaint, had been purchased, on June 28, 1875, by the firm of Riggs & Co. from said McDonald and White, with notice, during the pendency of the suit resulting in said decree, and for which, as the complaint further claimed, the said firm, as purchaser *pendente lite*, and its surviving members, became liable, by force of said decree, to the plaintiffs in the New York action.

The court of appeals of New York—therein affirming the decisions pronounced in the action by the courts below of that State—refused to accord to the decree of the supreme court of the District the effect claimed for it by Hovey and Dole in their complaint, and to reverse the judgment of the Court of Appeals is the object of the present writ of error.

For a complete understanding of the cause as developed in the State tribunals, some particularity of statement becomes necessary.

McDonald, a British subject, had presented to the Mixed Commission, created under the Treaty of Washington of May 8, 1871, and composed of three members, his claim, or claims, against the United States, amounting to upwards of $2,000,000, for some 5,000 bales of cotton, which, as he alleged, had been by him purchased, under permits from the *Treasury Department*, in the States of Louisiana and Arkansas, in the months of May and June, 1864 (Ex. 1, ff. 549, 550), but been destroyed in those States, during the following year, by the military forces of the United States. (Rec., ff. 23, 24; Ex. 1, ff. 156–158.)

On September 25, 1873, the Italian and English members of the Commission, awarded to Great Britain, in respect of these claims, the sum of $197,190, in gold, (Rec., ff. 21, 34; Ex. 1, ff. 23, 191,) which, under the terms of the treaty, became payable, (less 5 %, retained to meet the expenses of the Commission,) to that country by the United States, within one year from the date of the award.

Nearly five years previously, however, on December 19, 1868, McDonald, on his own petition, had been adjudged bankrupt, in the district court of the United States for the southern district of Ohio. (Ex. 1, f. 541.)

In February, 1869, one *Phelps* had been appointed his assignee, and had received the usual assignment, (Ex. 1, ff. 542, 543,) and, in September, 1869, under color of authority from such district court in Ohio, had sold, for $20, unto one *White*, "the uncollected accounts" belonging to the insolvent estate. (Ex. 1, ff. 1779–1792.)

On September 7, 1874, less than a fortnight before the date ere which the award must be paid by the United States to the English government, Phelps, as such assignee, having

filed against McDonald in the supreme court of the District of Columbia, a bill in equity, claiming, for the complainant therein, the entire award, and seeking to enjoin the defendant from receiving or collecting the same from the agents of Great Britain, McDonald was enjoined, accordingly. (Rec., p. 82; Ex. 1, ff. 484–508.)

This suit will hereafter be designated as *Phelps vs. McDonald.*

Phelps, with leave, on October 2, 1874, amended his bill by making White party thereto, (Rec., f. 112,) and, four days thereafter, White was restrained as McDonald had been restrained. (Ex. 1, f. 337; Rec., f. 113.)

On December 28, 1874, both defendants were again restrained from such receipt or collection of the award, and *George W. Riggs* was appointed receiver in the cause, to secure the amount of the award and to hold the same until, and subject to, the further order of the court. (Rec., f. 113; Ex. 1, ff. 584–586.)

Under this appointment, the receiver, on February 15, 1875, collected from the agent of Great Britain $93,655.21, in gold. (Rec., ff. 113, 115.)*

The case of Phelps *vs.* McDonald, which, under that title, came before this Court, on demurrer, at October term, 1878 (99 U. S., 298), is thus noticed, by reason of its relation to another proceeding, more directly associated with the present controversy.

---

*Such, at least, is the finding of the referee. But, deducting, for the expenses of the Commission, as required by the treaty, 5 per cent. of $197,190, in gold, the one-half of the residue paid to the receiver, would be $93,665.25, which, indeed, is the sum with which the receiver charges himself in account. (Ex. 1, ff. 1235, 1239.)

On October 2, 1874—the day on which Phelps filed his amended bill—*Hovey* and *Dole* filed in the supreme court of this District, their bill against McDonald and White, asserting, in effect, under contract in writing made with McDonald in June, 1873, a lien upon the award, for a sum equal to one-quarter thereof, on account of services rendered by those complainants in the prosecution of the claims before the Mixed Commission. (Rec., ff. 15, 43, 81–82, 97–98, 111, 135–136; Ex. 1, ff. 1–22.)

This suit will be hereafter designated as *Hovey vs. McDonald*, the title under which, as we shall see, it has twice come before this Court, though upon questions not immediately affecting the merits of the cause now to be determined.

Upon the filing of the bill in Hovey *vs.* McDonald, and agreeably to one of its prayers, the defendants to the bill were restrained from collecting *more than three-fourths* of the award. (Rec., ff. 82, 111; Ex. 1, ff. 27–28.)

On February 16, 1875, by decree passed in Phelps *vs.* McDonald (a copy of which decree was directed to be filed in Hovey *vs.* McDonald), and by consent of all the parties to the two suits, White was empowered to receive from the British government one-half of the net amount of the award, in order to enable him to defray *the expenses, (exclusive of such as were embraced in the demand of Hovey and Dole,)* incurred by McDonald in the prosecution of his claim, "*which sum of one-half of said award,*" it is recited in the decree, "*the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant* * * * before said Mixed Commission," *exclusive of the demand of Hovey and Dole*—and the remaining one-half of the net amount of the award was to be collected by George W. Riggs, receiver, to

be by him held subject to the claims, liens and rights of Hovey and Dole, on the one hand, and of Phelps, assignee, on the other, as such claims, liens and rights might be determined by further decree, and to be by the receiver meanwhile invested either in bonds of the Government, or in 3.65 bonds of the District of Columbia. (Rec., ff. 83–84, 99, 113–114; Ex. 1, ff. 90–95.)

On the day preceding this decree, and under the order passed on December 28, 1874, in Phelps *vs.* McDonald, the receiver had collected, as we have seen, one-half of the net amount of the award.

Under the decree of February 16, 1875, he converted his collection into currency (Rec., f. 115), wherewith, in March, 1875 (Ex. 1, f. 1235), he purchased 3.65 bonds of the District of Columbia, to the amount of $152,300, $300 of such bonds being coupon bonds and the residue thereof registered bonds (Rec., ff. 84, 99–100, 116; Ex. 1, ff. 1235–1236), payable to "George W. Riggs, receiver, or assigns." (Rec., ff. 105, 116.)

On April 7, 1875, the defendants, in Hovey *vs.* McDonald, demurred to the bill (Rec., f. 84; Ex. 1, ff. 139–144), and, on the 21st of April, 1875, the demurrer was allowed, with leave to the complainants to amend within six days, on payment of costs. (Rec., f. 84; Ex. 1, ff. 145–147.)

The complainants in Hovey *vs.* McDonald having, on April 27, 1875, therein filed their amended bill (Rec., ff. 21, 84; Ex. 1, ff. 148–207), the defendants, on May 7, 1875, demurred to the amended bill (Rec., f. 84, 136; Ex. 1, ff. 238–244), and, on June 24, 1875, it was decreed, at special term, that the demurrer to the amended bill be sustained, and the bill dismissed. (Rec., ff. 39, 84, 136; Ex. 1, ff. 250–252.)

On June 28, 1875—four days later—(Rec., f. 136), and during the same special term, (Rec., ff. 88, 124,) it was there decreed as follows:

"That the demurrer to said bill of complaint be sustained, and the bill of complaint herein is dismissed at the cost of the plaintiff, and the receiver appointed in this cause and in Phelps, assignee, *vs.* McDonald and White, No. 3910, be directed to pay the funds belonging to said cause, to the defendants McDonald and White, or order, and thereupon said receiver shall be discharged." (Ex. 1, ff. 254–256; Rec., ff. 39–40, 84, 136.)

On the same day a similar decree was passed in Phelps *vs.* McDonald. (Rec., ff. 115–116.)

From the decree passed on June 24, 1875, in Hovey *vs.* McDonald, the complainants therein appealed, on the same day, to the general term of the supreme court of the District (Rec., ff. 84, 100; Ex. 1, ff. 253–254), but filed no bond, upon such appeal, until July 12, 1875. (Rec., f. 100, Ex. 1, ff. 266–269.)

From the decree passed in that cause on June 28, 1875, the complainants appealed to the general term, on July 2, 1875, but, on such latter appeal, filed no bond, until July 13, 1875. (Rec., ff. 85–86, 100; Ex. 1, ff. 260–261, 270–272.)

The relation to each other of these decrees and the operation of the appeals taken therefrom, were considered by *this* Court at October term, 1883, in Hovey *vs.* McDonald, 109 U. S., 150.

On June 28, 1875, and after the entry of the decrees passed on that day in the two causes, as already mentioned,

the counsel for the defendants therein, together with McDonald, in person, made formal demand upon the receiver, for the securities then held by him as such.

Thereupon, the receiver, accompanied by McDonald and his counsel, as well as by the counsel of Phelps, assignee, appeared before the justice by whom the decrees were rendered, and, of such justice, in open court, inquired the duty of the receiver, in the premises, and was, thereupon, in open court and from the bench, by that justice instructed to obey the decrees. (Rec., ff. 84–85, 115–117, 136.)

The recognition due from the receiver to such decrees and instruction, was affirmed by this Court in Hovey *vs.* McDonald, 109 U. S., 150.

After being so instructed by such justice, and during business hours of the 28th of June, 1875, the receiver indorsed in blank, with due acknowledgment, all of the said registered bonds, and the same, together with the abovementioned $300 in coupon bonds, delivered into the actual and manual possession of McDonald, both for himself and as attorney of White. (Rec., ff. 85, 117–118.)

The receiver, prior to his appointment as such, had been, and, until long after the 28th of June, 1875, continued to remain, a member of the banking firm of Riggs & Co., which conducted business as well in the city of Washington, as in the city of New York.

His copartners were Messrs. Elliott, Glover, Hyde and Kieckhoefer.

Of these, the first resided in, and conducted the firm business at, the city of New York. The others resided, and, with the said George W. Riggs, conducted the firm business, at Washington. (Rec., ff. 100–101, 115.)

McDonald, on June 28, 1875, and immediately upon his receipt of the bonds, sold and delivered the same to the firm of Riggs & Co. (Rec., ff. 85, 100, 118, 136), who purchased them at 71 per cent., their fair market value (Rec. ff. 85, 120, 136), "in good faith, in point of fact, and in the actual belief that they had good right to make such purchase." (Rec., f. 120.)

On the same day, Riggs & Co. surrendered to the Treasury the registered bonds thus bought of McDonald, and, in lieu thereof, obtained from the Government, new securities payable directly to the firm. (Rec., ff. 85, 118, 136.)

By December 10, 1875, all of such new securities, together with the $300 in coupon bonds, had been sold by Riggs & Co. upon the market (Rec., ff. 85, 120–121, 136), and, it appears, at very inconsiderable profit to the firm. (Rec., ff. 120–121.)

The case now before *this* Court, arises out of such purchase by Riggs & Co. of the bonds from McDonald,—a purchase, made, it is claimed, pending the suit of Hovey *vs.* McDonald, wherein, after various proceedings subsequent to the purchase, a decree, final upon its face, was rendered, in the general term, for the complainants.

It becomes necessary, in consequence, to examine those proceedings, as well as the nature of such final decree itself.

On March 4, 1876, the decrees passed in Hovey *vs.* McDonald, on the 24th and 28th of June, 1875, were reversed by the general term, with costs, and the cause was remanded to the special term, with leave to the defendants to answer. (Rec., p. 33, ff. 86, 136, 137; Ex. 1, pp. 100–101.)

On May 2, 1876, the defendants answered the bill, denying, in effect, all the equities thereof, and setting up facts and circumstances which, if true, must not only defeat the suit of the complainants, but render each of them criminally infamous. (Rec., pp. 33–49; Ex. 1, pp. 102–129.)

To this answer, the complainants filed, on May 6, 1876, a *general replication*. (Rec., f. 66; Ex. 1, p. 197.)

But, on May 5, 1876, the day preceding the filing of this replication, the complainants, suggesting the reversal, by the general term, of the decree passed on June 28, 1875, moved, upon such suggestion, that the defendants be required "*to deposit in the custody of the court*," the sum of $49,297.50,* in gold, by them, obtained, it was alleged, under that decree, from the receiver, (Ex. 1, p. 131; Rec., pp. 62–63,) which motion, on September 15, 1876, was directed to be heard in the general term, in the first instance. (Ex. 1, pp. 151–152; Rec., ff. 68, 86.)

By the 21st day of February, 1877, however, and before decision upon that motion, the testimony in the cause,

* This sum represents one-fourth of the *gross* award of $197,190. But 5 per cent. being deducted from the gross award, under the treaty, for the expenses of the Commission, the *net* award was but $187,330.50, one-fourth of which, or one-half of the moiety thereof collected by the receiver, was but $46,832.62½.

which was very voluminous, had been closed on both sides (Ex. 1, pp. 1485, 1488), and, on April 18, 1877, it had been decreed, "that *the cause* be certified to the general term, there *to be heard* in the first instance." (Ex. 1, p. 309; Rec., p. 105.)

On June 19, 1877, the motion of May 5, 1876, coming on to be heard before the general term, the defendants were ordered and required "to pay over *to the registry of the court*," the said sum of $49,297.50, "without delay or defalcation." (Ex. 1, pp. 311–312; Rec., ff. 69–70, 86, 137.)

This order and requirement remaining unobserved, the complainants, on September 14, 1877, filed in the general term their motion for a rule on the defendants "to show cause * * * why they and each of them *should not be punished* for disobedience of the order of the court directing them to pay the said money into the registry of the court, *as for a contempt*." (Ex. 1, pp. 312–314; Rec., f. 71.)

But, on September 25, 1877, counsel for the defendants were notified by counsel for the complainants, that the rule on the defendants to show cause why they should not "be *punished as for a contempt of court*, for refusing and neglecting to restore to the registry of the court, the sum of $49,297.50, in gold," would "be called up" on a date different from that previously signified to the counsel of the defendants by the counsel of the complainants. (Ex. 1, pp. 326–327.)

On December 8, 1877, "upon *the* motion made by the complainants for a rule upon the defendants to show cause *why they should not be* decreed to be in and *punished for a*

contempt, for having failed to obey " the above order of June 19, 1877, requiring them to pay the said sum of money into the registry of the court, and after argument on behalf of the complainants, " counsel for defendants being absent, though duly notified," it was ordered, adjudged, and decreed, " that the *said* rule be made *absolute* " and the defendants " be taken and deemed to be *in contempt of the aforesaid order* "; that unless the defendants, within six days from the entry of the decree of December 8, 1877, and the service of a copy thereof upon their solicitors, should, in all respects, comply with the said order of June 19, 1877, and make payment, as thereby required, into the registry of the court, " *the answer filed by them in this cause be stricken out* " and " *this cause proceed as if no answer thereto had been interposed*," and that, " until such compliance, all proceedings *on the part of the defendants* in this cause be, and the same are, hereby *stayed*." (Ex. 1, pp. 329, 330; Rec., pp. 53–54, 63, 99.)

The complainants,—suggesting to the court, due service upon the solicitors of the defendants, of a certified copy of the above decree of December 8, 1877, the expiration of more than six days, both since the said decree and the date of such service of a copy thereof, and that the defendants had failed to comply with such decree,—on December 19, 1877, moved the general term, in effect, for an order enforcing the provisions of the said decree applicable to such failure and default. (Ex. 1, pp. 333–334.)

This motion was renewed on December 27, 1877. (Ex. 1, pp. 335–336; Rec., f. 74.)

On December 29, 1877—" *the* motion for *a* rule on the defendants to show cause *why their answer should not be stricken out* " coming on to be heard, and being argued for the com-

plainants, "no one appearing for defendants"—it was ordered, adjudged, and decreed by the general term, that the answer of the defendants "*be stricken out and removed from the files of the court* and that this cause do *proceed as if no answer herein had been interposed,*" and that until the defendants should comply with the above orders of June 19, 1877, and December 8, 1877, and make the deposit by such orders directed, "all proceedings *on the part of the defendants* in this cause *are stayed.*" (Ex. 1, pp. 337–338; Rec., ff. 75–76, 87, 137–138.) *

On December 31, 1877, the complainants file, and serve upon the solicitors of the defendants, notice, that the complainants will "move for a *pro confesso* against the defendants, on the ground that *their answer has been ordered to be removed from the files and stricken out, and the cause ordered to be proceeded with as if no answer had been interposed.*" (Ex. 1, p. 339.)

This motion, it would seem, had been ordered, on January 14, 1878, "to be heard *before a full bench*" of the general term, but, on February 6, 1878, the complainants procured the rescission of such order. (Ex. 1, p. 352.)

And, on February 12, 1878, there was passed by the general term, the decree following:

"The answer of the defendants *having been removed from the files,* FOR THEIR CONTEMPT IN REFUSING TO OBEY THE ORDER OF THE COURT and deposit in the registry the sum

* In this decree Mr. Justice Wylie took no part, having been absent when the decree of December 8, 1877 was argued and decided. (Ex. 1, p. 339.)

of" $49,297.50, "it is now ordered, adjudged and decreed, *that the bill be taken pro confesso against them.*" (Ex. 1, p. 354; Rec., pp. 56, 63, 99–100.)

By a decree of the general term, passed on April 17, 1878, entitled "*Decree making absolute former decree,*" and reciting the decree *pro confesso* of February 11, (*sic,*) 1878, reciting, also, that the defendants were "*still in contempt* of the orders of" June 19, 1877, and December 8, 1877, and were "still refusing and neglecting to obey the said orders," and further reciting, at large, the supposed matters of fact "appearing by the original and amended bills of complaint" and that all of such matters of fact were "explicit" in the said bills, and stood "*without denial on the part of the defendants,*" the decree *pro confesso* was made absolute, the defendants were decreed to pay to the complainants the sum of $49,297.50, in gold, and, for such sum of money, with legal interest thereon from the date of the decree, the complainants were adjudged to "have a lien *upon the claim*" of McDonald against the United States, "*as awarded by the Mixed Commission,*" "and upon any draft, money, evidence of indebtedness or proceeds thereof." (Ex. 1, pp. 356–358; Rec., pp. 57–58, 63, 100.)

From this decree of April 17, 1879, McDonald, on September 6, 1883, and while confined in prison, in the city of New York, under circumstances hereinafter related, appealed to *this* Court, but, upon the ground that his disability from imprisonment had arisen several months after the entry of that decree, and had, hence, never arrested the operation of the statute of limitations, his appeal was here dismissed.

McDonald *vs.* Hovey, 110 U. S., 619.

Neither McDonald nor White, from before the 19th day of June, 1877, to and until after the 17th day of April, 1878, was to be found within the District of Columbia, (Rec., f. 107,) and notices of the motions resulting in the order of June 19, 1877, and in the orders and decrees passed subsequently thereto, inclusive of the decree of April 17, 1878, were served upon the solicitors who had appeared in the cause for the defendants. (Rec., f. 107.)

But, after the 19th of June, 1877, those solicitors, in point of fact, accepted no notice, nor otherwise assumed to act, on behalf of the defendants, whom, from whatever cause or motive, they claimed to represent no longer. (Ex. 1, pp. 286, 319, 328, 339, 343–345, 348–349, 350–351.)

The decrees of December 8, 1877 (Rec., p. 54; Ex. 1, p. 329), and of December 29, 1877 (Rec., p. 56; Ex. 1, p. 328), *very clearly*, and the decree *pro confesso* of February 12, 1878 (Rec., p. 56; Ex. 1, p. 354), as, also, the decree of April 17, 1878 (the application for which latter decree does not appear to have been argued, even on behalf of the complainants, Ex. 1., p. 356; Rec., pp. 57–58), *inferentially*, indicate that the defendants were not, in point of fact, represented before the court, when such decrees were directed or passed.

At the time of the entry of the decree of April 17, 1878, upon evidence adduced on both sides, embracing some 2,600 folios, and closed, as we have seen, as early as February 21, 1877, (Ex. 1, p. 1488,) "*the cause*," since April 18, 1877, (one year, less a single day, before the date of such decree,) had stood "certified to the general term there *to be heard* in the first instance." (Ex. 1, p. 309; Rec., p. 105.)

This evidence, on the part of the defendants, tended to show, amongst other things,

That, on October 14, 1872, one *Moyers* had been employed by McDonald to prosecute the claims of the latter before the Mixed Commission, under contract in writing, whereby the former was to receive, in the frank language of the convention, 15 per cent. of the recovery, "for all *professional* services rendered" by him "and all expenses incurred by him, *professionally*," in such prosecution, and "*an additional*" 35 per cent. of the recovery, "to meet *certain* obligations and expenses for services *other than professional*, incident to the prosecution of said claim;" (See this contract, Ex. 1, pp. 1216–1217, 1233–1234;)*

That, at a period when the United States were most strenuously resisting the claims of McDonald, as founded in fraud and perjury, he had been induced in June, 1873, by counsel then by him already employed, to engage, in writing, the services of the complainants, also, in the assertion of those claims, (Ex. 1, ff. 2491–2492, 3066, 3511–3512,) for a contingent compensation, made a lien upon the claims, equal to 25 per cent. of the recovery;†

That the contract in writing, made by McDonald with the complainants, in June, 1873, had been by him left in *escrow* with *Moyers*, his principal counsel, but that *Moyers*, in violation of the conditions of such escrow, had delivered the instrument to Hovey; (Ex. 1 ff. 1831, 1839;)

---

* We have seen that one-half the award was suffered to be collected by White, under the consent decree of February 16, 1875, in order to enable him to pay "the reasonable expense incident to the prosecution of the claim," exclusive of such expense as might arise from the demand of Hovey and Dole.

† Thus, in effect, to recover two millions of dollars, McDonald had, in writing, engaged to pay, in the event of such recovery, a million and a half.

That, at the time of his contract with the complainants, McDonald had already at least three counsel employed in the prosecution of his claims; (Ex. 1, ff. 2672–2673, 2753;)

That Hovey, when so employed by McDonald, had been "in practice" as a lawyer, at Washington, for about three years; (Ex. 1, f. 2636;) *

That Dole,—who had never been a member of the bar (Ex. 1, f. 2177),—when retained by McDonald, in conjunction with Hovey, was upwards of 60 years of age (Ex. 1, ff. 2210, 2658), and had so long and seriously suffered from the effects of "*chronic alcoholism*," as to be disqualified for any considerable mental exertion (Ex. 1, ff. 2066–2067, 2069, 2071, 2073, 2078, 2082–2083, 2652, 2656, 2666, 3411–3413, 3418, 3723–3724, 3728–3729); that he was, however, a man of large wealth (Ex. 1, f. 1927), a politician (Ex. 1, f. 1933), and a former Commissioner of Indian Affairs;

That the object with which the services of the complainants had been engaged and enlisted by McDonald, or his agents, was that Hovey, through a certain *the Marquis de Chambrun*, should endeavor to corruptly influence Count Corti, the Italian Commissioner, in favor of said claims (Ex. 1, ff. 3507, 1836–1837, 3502, 3217–3219, 3243, 3253–3254, 3507, 3542, 3575, 3579–3583, 3729–3730), and that Dole, through one *Defrees*, residing at Berkeley Springs, in West Virginia, where, also, for part of each year, Dole himself resided, should endeavor to influence, in like manner, Mr. *Frazer*, the American Commissioner, who had long been acquainted with Dole, and was brother-in-law to Defrees (Ex. 1, ff. 2166, 2175, 2536, 3506, 3573)—the attitude of Mr. Gurney, the British Commissioner, towards a fellow-

*There was no evidence that he had practiced law elsewhere—none, that he had ever addressed, or been employed to address, a judicial tribunal, orally, or in print.

subject, being assumed by McDonald and his counsel as at once obvious and unavoidable;

That the attempt, or purpose, to employ nefarious agencies to secure the allowance of the claims, by a majority of the Commission, was repeatedly avowed by Hovey (Ex. 1, ff. 1836, 2002, 2004, 2010, 2581, 3047–3048, 3431, 3579, 3580, 3606, 3611, 3632, 3633), and openly admitted by Dole (Ex. 1, ff. 3729–3730);

That while the claim was pending before the Commission, Dole had induced Defrees, brother-in-law, as has been seen, of the American Commissioner, to communicate with that Commissioner respecting the claim; that Defrees, thereupon, addressed Mr. Frazer, by letter, (afterwards destroyed by the addressed,) to the effect, that the writer had been offered "a good contingent fee, if he would make an argument in the case," but that, being "too poor a man" to waste his time or money upon the improbable, he desired to know from Mr. Frazer—if the latter might properly answer,—the prospect for the allowance of the claim; (Ex. 1, ff. 2165–2166, 2168, 2184, 2583, 2593–2595;)

That, after the award had been rendered, *the former counsel of McDonald before the Commission, including Hovey, who furnished money for the misdeed,* (Ex. 1, ff. 1879, 1886, 1890,) caused McDonald to be indicted *in a State court of Arkansas,* (Ex. 1, ff. 1879, 1904, 2808, 4403), *for fraud and perjury committed against the United States, in respect to his claims before the Commission,* (Ex. 1, ff. 1865–1866,) and, upon such indictment, obtained from Governor Garland of that State, a requisition for the person of McDonald, first, upon the governor of Kentucky, and, McDonald having departed from that State, (Ex. 1, ff. 1865–1866) afterwards, upon Governor Tilden, of New York, (Ex. 1, ff. 2808, 4378, 4403–4404,) under which last requisition, of which one *H. B. Titus*

was bearer and deliverer, (Ex. 1, ff. 2809, 4378–4379, 4403–4404,) McDonald was arrested in New York, on or about the 20th of February, 1876, (Ex. 1, f. 4404,) but was subsequently discharged, upon *habeas corpus*, "on the ground," as explained by Mr. Titus, "of informality in the indictment and that he was *not indicted in the proper court;*" (Ex. 1, f. 4405;)

That, after the award, Hovey refused to consider overtures of compromise from McDonald, until the former might communicate with a certain person in Europe, or across the water; (Ex. 1, ff. 1837, 2340, 2967;)*

And that one of the counsel of McDonald (*Murphy,*) did not hesitate to declare his belief, that the claim was wholly dishonest, that corrupt practices had been attempted to secure its allowance, and that it was eminently desirable "*to hide*" *the entire subject forever.* (Ex. 1, ff. 2334 *et seq.;* 2342, 2998.)

So far as appears from the record of the proceedings had in the supreme court of this District, in Hovey *vs.* McDonald, after the year 1876, upon none of them was the general term, if reminded that testimony had been at all adduced in the cause, informed or made acquainted with the nature of the testimony, and much less, that, as early as February 21, 1877, the evidence, on both sides, had been *closed.*

The merit ascribed by Hovey, in his testimony, to the services of Dole and himself, in connection with the claim,

---

*The name of this person is left undisclosed by the evidence, but, on May 16, 1876, a commission was awarded, on motion of the complainants, to take the testimony of *de Chambrun*, then in Paris (Ex. 1, ff. 413–414), and his deposition was, in fact, there taken, on June 22, 1876. (Ex. 1, f. 2446.)

and the point upon which, as he asserts, the award was finally rendered, were his contention,—not derived from the memorial filed by the claimant with the Commission, (Ex 1., ff. 548–550)—but founded wholly upon a felicitious suggestion made to Hovey by Dole, in June, 1873, that the permit of McDonald to purchase, beyond the military lines of the United States, the cotton involved in his claim, must be taken as lawful and unquestionable by the Commission, *because granted by the President.* (Ex. 1, ff. 2640, 2645, 4173.)

The alleged purchases of cotton by McDonald were made in the months of *May* and *June*, 1864. (Ex. 1, ff. 549–550.)

Now, under section 5 of act of Congress of July 13, 1861, (12 Stat., 257), which continued in force until repealed by section 9 of act of Congress of *July* 2, 1864, (13 Stat., 377; U. S. *vs.* Lane, 8 Wall., 198, Dec. T., 1868,) the President had been expressly authorized to license and permit commercial intercourse within insurrectionary territory, though such intercourse, so far as by him it might be licensed, was to be conducted and carried on only in pursuance of rules and regulations to be prescribed by the Secretary of the Treasury.

And long before the year 1873, it had been by this Court *six* times, at least, adjudged, that, under the act of July 13, 1861, it was the President, *and the President alone*, who could license and permit such commercial intercourse.

The Reform, 3 Wall., 632, Dec. T., 1865.
The Sea Lion, 5 *Id.*, 630, Dec. T., 1866.
The Ouachita Cotton, 6 *Id.*, 530–531, Dec. T., 1867.
Coppell *vs.* Hall, 7 *Id.*, 355, 356, Dec. T., 1868.
McKee *vs.* U. S., 8 *Id.*, 166, Dec. T., 1868.
U. S. *vs.* Lane, 8 *Id.*, 195–196, Dec. T., 1868.

And long before the year 1873, it had been by this Court *twice*, at least, determined, that permits issued by the proper officers of the Treasury Department, for commercial intercourse within particular districts in the Southern States, furnished *prima facie* evidence that such districts, at the dates of the permits, were no longer beyond the military occupation of the United States.

U. S. *vs.* Weed, 5 Wall., 62, 73, Dec. T., 1866.
Butler *vs.* Maples, 9 *Id.*, 766, 777–778, Dec. T., 1869.

The complainants in Hovey *vs.* McDonald, having exhausted their remedy, in the particular suit, against the defendants, next turned their attention to the receiver, with the view of subjecting him to personal liability for surrendering the bonds to McDonald, in accordance with the decree of June 28, 1875, and under the circumstances already narrated.

On April 24, 1878, one week after the entry of the final decree against the defendants in Hovey *vs.* McDonald, the complainants therein moved for an order directing the receiver "*to file an account*, showing the amounts received by him under the order of the court" of February 16, 1875, "and of *his administration and disposition* of said sums" (Ex. 1, ff. 1084, 1090–1091), which order was granted, on June 7, 1878 (Ex. 1, ff. 1114–1116; Rec., f. 104), though it had appeared by decree, as early as July 6, 1875, that the fund in controversy had been paid over by the receiver to the defendants (Ex. 1, f. 264); though the complainants, on May 5, 1876, had moved that the defendants be required to deposit that fund, (amounting, it was claimed in the motion, to $49,297.50, in gold,) with the court, and the motion had been rested upon the distinct and express ground, that the defendants had actually obtained the fund from the receiver,

under the decree of June 28, 1875 (Ex. 1, ff. 392-393); and though the fact of payment by the receiver of the fund to the defendants, under the decree last mentioned, had been adjudged by the decree of June 19, 1877 (Ex. 1, f. 933; Rec., ff. 69–70), and was the basis and foundation of all subsequent proceedings conducted against the defendants in the supreme court of the District.

The receiver having, on June 17, 1878, filed his account (Ex. 1, ff. 1233–1241; Rec., f. 104), and the complainants having, on July 1, 1878, interposed exceptions thereto (Ex. 1, f. 1246), the account and exceptions were referred, on the latter date, to the auditor of the court (Ex. 1, f. 1254), an officer possessing the authority and discharging the functions of a standing master in chancery.

On October 4, 1878 (Ex. 1, f. 1138), the auditor filed his report, adopting the account rendered by the receiver, and disallowing the exceptions taken thereto (Ex. 1, f. 1368); whereupon, on October 24, 1878 (Ex. 1, f. 1726), the complainants filed exceptions, in turn, to the report of the auditor, and these exceptions having, on January 22, 1879 (Ex. 1, ff. 1743–1744; Rec., f. 104), been overruled by the general term, the complainants, on that day, appealed to *this* Court, which, at October term, 1883, affirmed the decree below.

Hovey *vs.* McDonald, 109 U. S., 150.

At the same term, it was represented to this Court by McDonald, and "not disputed" by Hovey and Dole, that, upon the decree passed in Hovey *vs.* McDonald, on April 17, 1878, they had recovered judgment against him, in one of the local courts of the city of New York, and, after such recovery, and on February 7, 1879, had caused him to be thrown and confined in prison, at that city, in which confinement

he had *hitherto*,—and hence for 4 years and 8 months—remained.

McDonald *vs.* Hovey, 110 U. S., 619.

In the course of the proceedings conducted against the receiver before the auditor, it had appeared by the testimony of *Riggs*, (Ex. 1, ff. 1418–1420,) of *Glover*, (Ex. 1, ff. 1482, 1485,) and of *Ray*, counsel of the defendants in Hovey *vs.* McDonald, (*Id.*, ff. 1523–1526,) that the bonds delivered by the receiver to McDonald, on June 28, 1875, had been, on the same day, sold and delivered by McDonald to the firm of Riggs & Co., of which the receiver was principal member.

No exception was taken, however, to the report of the auditor, on account of the purchase thus disclosed, in the progress of the audit.

Hovey, before and during the year 1875, resided in Washington, where he afterwards continued to reside.

From November, 1868, until some time in the month of August, 1875, he was a depositor with Riggs & Co.

He frequented their banking-house at that city, and was personally acquainted both with Mr. Riggs and with Glover. (Rec., f. 121.)

Dole, before and during the year 1875, resided, for part of each year, in Washington, and for part, at Berkeley Springs, in West Virginia, and was a depositor, at Washington, with that firm, from 1874 to 1881. (Rec., f. 121.)

And from July 1, 1875, Hovey had possessed "adequate means of fully ascertaining how" the registered bonds delivered by the receiver to McDonald "had been last held and ultimately disposed of." (Rec., f. 122.)

It has been seen, that the bonds were purchased by Riggs & Co. from McDonald, on June 28, 1875, at 71, their fair market value, on that date, and that their reissues were sold and dispersed upon the market, by that firm, before the 10th of the month of December, next following. (Rec., ff. 85, 120–121, 136.)

Mr. Riggs departed this life, on August 24, 1881 (Rec., f. 126). And it may be remembered, that, of his surviving partners, Glover, Hyde and Kieckhoefer resided within the District of Columbia, and John Elliott alone at the city of New York. (Rec., f. 115.)

The action—entitled *Hovey vs. Elliott*—which resulted in the judgment sought to be reversed on the present writ of error, was brought by Hovey and Dole, in the superior court of the city of New York, against all of the surviving partners of Riggs & Co., on the 16th day of April, 1884 (Rec., ff. 1, 96, 123, 138), more than *eight years* after the purchase of the bonds, and the sale, in open market, of their reissues, by that firm; *six years*, (less a single day,) since the decree passed in Hovey *vs.* McDonald on April 17, 1878, (Rec., f. 138,) and nearly two years and six months subsequent to the decease of Mr. Riggs, after which event, "and PENDING *the institution of this suit*," (such, upon the face of the record, is the language of the referee,) "the assets of the firm of Riggs & Co. were duly administered and divided amongst the surviving partners and the personal representatives of Mr. Riggs." (Rec., f. 126.)

But this language is so evidently the result of inadvertence or error, (clerical mistakes are frequent in the record,) that the referee can only be understood to imply, that the firm assets had been administered and divided in advance

of the commencement of the suit in the superior court of the city of New York.*

In the action thus brought in the State court, John Elliott alone was served with process, or appeared to the proceeding. (Rec., pp. 6, 90.)

But, as between Elliott, on the one hand, and Glover, Hyde, Kieckhoefer and the personal representatives of Mr. Riggs, on the other, the last three partners, together with such personal representatives, were and are substantial parties to the action, since, as between themselves and Elliott, they would, in the event of judgment against him in his lifetime, have been *liable to contribution*, and will, in case of recovery against his executors, continue so liable.

The complaint—not distinguished throughout for candor—set forth, in effect, the decease of Mr. Riggs and the copartnership existing in his lifetime between himself and the defendants; the claim asserted by McDonald before the Mixed Commission and his contract in writing with the plaintiffs for their compensation and lien, in assisting in the

---

* The finding purports to have been made at the request of the defendants to the action. (Rec., f. 111.)

Yet, the defendants could have no motive in establishing, as fact, that the administration and division of the firm assets had occurred *after* the commencement of litigation in the State court, especially, as the defendants were being confronted, in that very litigation, with the maxim, *nil innovetur pendente lite.*

The "*institution*" of the New York suit, moreover, was effected, under the State law, by mere delivery of the summons to the sheriff, with instructions to serve it, (Rec., ff. 96, 123,) and it is impossible to suppose, that the administration and division of the firm assets were delayed for two years and six months after the decease of Mr. Riggs, and accomplished only during the "transitory instant" embraced in the delivery of the summons to the sheriff, with instructions to serve it.

prosecution of the claim; the award rendered by the Commission, and the subsequent assignment by McDonald of the claim unto White; the suit in equity, and the injunction obtained therein, by the plaintiffs, in Hovey *vs.* McDonald, in the supreme court of the District of Columbia; the consent decree in such suit in equity, for payment of one-half of the award to the receiver, to be by him held, (as incorrectly averred in the complaint) "subject to the claims, liens and rights *of the plaintiffs*," and invested in bonds of the United States, or in 3.65 bonds of the District of Columbia, and the collection, and investment in the latter bonds, made by Mr. Riggs, as receiver, accordingly; that McDonald, about the 28th of June, 1875, had "*obtained possession of the said bonds from the said Riggs, without the consent of the plaintiffs*, with intent to defraud the plaintiffs, and deprive them of their claim, lien and right therein, and, with like intent, simultaneously sold the said bonds" to Riggs & Co., who had purchased the bonds "with full knowledge of the said fraud, and of the claim, lien and right of the plaintiff in and to the said bonds; and with full knowledge of the pendency of the said suit" in the District of Columbia, "and of the deposit of said bonds" with the receiver, under the said consent decree; that, until the 17th day of June, 1878, "the plaintiff had no knowledge *or means of knowing*" of the purchase of said bonds by Riggs & Co., and that, in their suit in the said District, the plaintiffs, on April 17, 1878, had obtained against McDonald and White, a final judgment—still in full force and unreversed—for $49,297.50, in gold, and declaring a lien in favor of the plaintiffs upon the claim of McDonald, and its proceeds.

And the complainant prayed, in substance, in addition to general relief, that the defendants might be deemed "trustees of *the said bonds*, for the benefit of the plaintiffs;" that the plaintiffs be deemed to "have a lien and claim upon and right to *the said bonds*," and the defendants adjudged to have purchased the bonds, to the extent of one-half thereof,

subject to such lien, claim and right, and that the defendants "account to the plaintiffs for *said bonds*," and be ordered to "deliver to the plaintiffs one-half of *said bonds*." (Rec., pp. 8–9.)*

The defendant, Elliott, having interposed an original (Rec., pp. 111–112,) and, afterwards, an amended, (Rec., pp. 113–115,) answer, to the complaint, in Hovey *vs.* Elliott, procured, on October 18, 1884, the removal of the cause from the State court to the circuit court of the United States for the southern district of New York, but as no sufficient Federal question was raised in either of those answers, nor properly disclosed in the petition for removal, the cause, on October 23, 1884, was remanded to the forum of its origin. (Rec., ff. 172–180.)

The action of Hovey *vs.* Elliott was subsequently transmitted to Mr. Edward *Patterson*, as referee, who, resting his decision upon the bar of the six years' statute of limitation (Rec., p. 103), set up in the original (Rec., pp. 111–112), and in the amended (Rec., pp. 113–115), answers, directed judgment for the defendant, dismissing the complaint, which

---

* *Hovey* and *Phelps* had "hunted in couple" at Washington.

They moved almost simultaneously, in the city of New York, against the surviving partners of Riggs & Co.

While Hovey and Dole were there pursuing those partners, in the superior court, for *one-half* of the bonds, Phelps, as assignee, on August 20, 1884, brought, in the same court, an action (which, on October 13, 1884, was removed to the circuit court of the United States,) against the surviving partners of Riggs & Co., to recover *the whole* of the bonds, or their proceeds.

This suit, to which appeared only Kieckhoefer (Phelps *vs.* Elliott, 29 Fed. Rep., 54) and John Elliott, was decreed by the circuit court to be dismissed, in 1888, (Phelps *vs.* Elliott, 35 Fed. Rep., 462) and, upon appeal to *this* Court, the appeal itself was dismissed, at October term, 1890. (Phelps *vs.* Elliott, 140 U. S., 694.)

judgment, after entry, was affirmed, on appeal, in May, 1888, by the general term of the superior court (Rec., p. 103; Hovey *vs.* Elliott, 53 N. Y. Sup. Ct., 331), but such judgment of affirmance was reversed, in 1890, by the *Second Division* (a temporary tribunal created for the relief of the highest court of the State), of the court of appeals of New York, four of the seven judges composing such Second Division, being in favor of reversal, and *Haight*, J., with whom concurred the chief justice and another member of that division, dissenting from the majority opinion (Rec., p. 103; Hovey *vs.* Elliott, 118 N. Y., 124), these four judges only, of the eleven judges who had passed upon the statute of limitations, being against the application and bar of that statute to the action. (Rec., p. 103.)

In 1888, and, hence, prior to this decree of reversal, John Elliott, the original defendant in the action, departed this life, and his executors, the present defendants in error, became parties in his stead. (Rec., ff. 1, 123.)

Dole, also, had expired, and the action was conducted by Hovey, as survivor. (Rec., f. 185.)

Upon the new trial granted on such reversal by the Second Division of the State court of appeals, the cause, on June 10, 1890, was transmitted to Mr. Daniel G. *Rollins*, as referee. (Rec., p. 58.)

Thereafter, in the month of June, 1890, (Rec., p. 6,) another amended answer, sworn June 25, 1890 (Rec., p. 15,) was served upon the plaintiff, and it was upon this last answer that the cause proceeded before that referee.

Such last amended answer raised many defenses.

1st. By its general denials, (pars. 1, 3, Rec., p. 10,) it controverted the existence of the contract and lien set up in the complaint.

2d. By the same denials, it contested, as well the existence of *lis pendens*, at the time of the purchase of the bonds by Riggs & Co., as the actual adjudication of such *lis*, if any there were, *pendens* at such time.

3d. It alleged, in effect, that the registered bonds purchased by that firm from McDonald, had been issued under the laws of the United States, and were, in contemplation of those laws, negotiable instruments; that the bonds, indorsed by the receiver, in blank, had been purchased by Riggs & Co., for full value, before maturity, in the usual course of business, and without notice or suspicion of any circumstance tending to restrain their circulation; and that the title to the securities acquired by the firm, through such purchase, was a valid title, founded upon the laws of the United States. (Par. 5, Rec., pp. 11, 12; par. 6, Rec., p. 12; par. 9, Rec., p. 14.)

4th. It set up, in anticipation of the development of a case materially different from that which a majority of the Second Division had conceived to be presented on the former trial, the six years' statute of limitations. (Par. 7, Rec., p. 12.)

5th. By express statement, and, also, by exhibits annexed to the amended answer and made part thereof, it traced the motions, orders and decrees made in the supreme court of the District, in Hovey *vs.* Dole, from the filing therein of the original bill down to and inclusive of the decree of April 17, 1878; alleged, in effect, that after general replication filed in that cause, to the answer of the defendants thereto, (which answer was also made an exhibit,) numerous depositions in support of such answer had been taken on behalf

of those defendants; and that the motions thus traced, were heard and determined, and the orders and decrees thus recited were made and entered, without regard to or consideration of any of said depositions; that the decree of April 17, 1878, "*was rendered solely upon and in consequence of*" the proceedings conducted in Hovey *vs.* McDonald, in the supreme court of the District, between the 5th day of March, 1876, inclusive, and the date of that decree; that, under the Constitution and laws of the United States, the supreme court of the District was without jurisdiction to render said decree, and the defendants to the action in New York enjoyed complete exemption and immunity from said decree. (Rec., pp. 12–14.)

Of the defenses thus raised by this amended answer, the fifth only (except as it involved, also, in effect, the first,) was sustained by the referee.

The sole proof of the alleged contract and lien of the plaintiff, attempted before the referee, was the decree passed by the supreme court of the District, on April 17, 1878.

Adopting the terms of certain particular requests made by the defendants, the referee found, in effect, in his report, filed in May, 1892, (Rec., p. 7,)

1. That to enable the plaintiff to recover against the defendants in his action, the decree passed by the supreme court of the District, on April 17, 1878, "must be a valid decree, binding upon those defendants;"

2. That from the operation of that decree, the defendants enjoyed exemption and immunity, under Revised Stat-

utes of the United States, section 725, relating to the punishment of contempts;

3. And the like exemption and immunity, under the fifth amendment to the Federal Constitution, prohibiting the deprivation of property, without due process of law;

4. That the supreme court of the District of Columbia was without jurisdiction to render said decree, and that the same was null and void;

5. That the plaintiffs had not, at the time of the purchase of the bonds by Riggs & Co. from McDonald, nor at any time thereafter, while that firm continued to hold the securities, any lien thereon;

6. That the decree of April 17, 1878, was not *res adjudicata* against the defendants, in the action before the referee;

7. And that the defendants were entitled to judgment, dismissing the complaint with costs, which judgment the referee directed to be entered accordingly.

(Rec., pp. 70–71.)

See, also, the Opinion of the referee. (Rec., pp. 97–108.)

Amongst the conclusions of law found also by the referee, at the request of the defendants, but not announced in his report, was the following:

"*Sixteenth.* That the decree of April 17, 1875 (*sic*)* (*if a valid decree at all,*) *is not competent evidence or proof of the existence of the plaintiffs' alleged lien as against the defendants, in this action.*" (Rec., p. 94.)

---

* 1875, by error, for 1878.

Judgment, as directed by the referee, having been entered on May 14, 1892, (Rec., pp. 6–7,) and affirmed, on appeal, in the general term of the superior court, (Rec., pp. 126, 127,) the judgment of affirmance was itself affirmed, in February, 1895, by the court of appeals. (Rec., pp. 129–130.)*

It is to reverse this last judgment, that the present writ of error is prosecuted.

Amongst the conclusions of law found by the referee, in his report, were in effect, as we have seen,

II. That from the operation of the decree passed by the supreme court of the District on April 17, 1878, the defendants were exempt, under the Revised Statutes of the United States, section 725. (Rec., p. 70.)

IV. That that court was without jurisdiction to render such decree, and that the same was null and void. (Rec., p. 71.)

The court of appeals, in its opinion, "only deem it necessary to consider the second and fourth conclusions of law found by the referee." (Rec., f. 193.)

In dealing with these conclusions, that court held, in effect,

That the Revised Statutes of the United States, section 725, limited the punishment for contempt, in the courts of

* It is a coincidence not unworthy, perhaps, of notice, that *Haight*, J., author of the minority opinion, in the Second Division of the court of appeals, on the *first trial* of the action, should announce, upon the *second trial*, the unanimous opinion of the permanent court of appeals, of which he had become a member, on the extinction of the Second Division, and that one of the justices who concurred in the latter opinion, should now be elevated to the tribunal which is to review the judgment in which he participated.

the United States, to fine and imprisonment, that the supreme court of the District was a court of the United States, within the meaning of this section, and that it was bound by the restriction contained in the section. (Rec., ff. 194–200.)

That, though the question whether the decree (designated as *judgment*, in the opinion,) passed by the supreme court of the District, on April 17, 1878, was void, or merely voidable, *might be* "*close and upon the border*," the court of appeals *were* "*inclined to the view* that, as to Riggs & Co., the judgment" was "void," and "that, after the answer had been interposed by the defendants, the court had no power to order judgment without a trial of the issues presented." (Rec., ff. 200–204.)

Conceding, without deciding, (Rec., ff. 193–194, 204–205,) that Riggs & Co. "purchased the bonds with notice of the pendency of *the* action and that they took the same subject to the determination *therein* to be made, they had the right to have the questions at issue determined upon the merits. * * * As purchasers *pendente lite*, Riggs & Co. took the risk of *the* litigation *then* pending, but; in so doing, did not assume the risk of *any punishment that might be inflicted* upon McDonald and White, *in an independent suit*." (Rec., ff. 204–205.)

That the contention that the decree striking out the answer of the defendants was not based upon the proceedings in contempt, was unsupported by the proceedings, orders and decree had and passed in the cause.

"If the answer was not stricken out as *a punishment for the contempt of which the defendants had been convicted*, then,

by what authority," it was inquired, "were the defendants deprived of their right to a trial and a determination of the issues involved?" (Rec., f. 205.)

Finally, to the argument that Revised Statutes of the United States, section 725, had reference only to *criminal*, and not to civil, contempts, it was answered, in effect, in the opinion, that neither in the section itself, nor in the authorities construing it, was such a distinction to be found. (Rec., f. 205.)

Points and Authorities.

I. *The decree of April 17, 1878, if valid in itself, was not binding upon the surviving members of the firm of Riggs & Co.*

1. The decree of April 17, 1878, was not passed in that *lis* which was *pendens* on June 28, 1875, when the bonds were purchased by Riggs & Co., but in another and different *lis*, commenced on September 14, 1877, by motion from the plaintiffs, that McDonald and White show cause why they "*should not be punished* * * * *as for a contempt.*" (Rec., ff. 70–71.)

See *Hovey vs. McDonald*, 3 MacA. (D. C.), 185 (an. 1877–1879).

Controversies between individuals often give rise to incidental proceedings essentially distinct from the controversies in which such proceedings originate.

Trustees *vs.* Greenhough, 105 U. S., 531;
Hovey *vs.* McDonald, 109 *id.*, 155;
Williams *vs.* Morgan, 111 *id.*, 699.

And as these incidental proceedings may be prosecuted upon different grounds, or conducted with different aims, from those asserted or proposed in the principal suit, the orders, judgments and decrees passed in such incidental proceedings, may be attended with different results, or operate upon different rights, from those which follow or are involved in the orders, judgments and decrees passed in the primary and original cause.

Amongst such incidental proceedings, may be such as are founded upon contempts of judicial authority.

The First Cong. Church, &c., vs. The City of Muscatine,
2 Clarke (Iowa), 69, 71–72.

In the suit brought by Hovey and Dole against McDonald and White, in the Supreme Court of the District, it was the prayer of the original bill, that the defendants might be compelled, by process, to appear and answer the bill. (Ex. 1, f. 14; Rec., f. 18.)

The relief sought in the original suit, was relief after opportunity for contestation and defense upon the merits.

And in the merits of the controversy, were involved only the existence and validity of the lien asserted by the plaintiffs.

When, on June 28, 1875, the bonds were purchased by Riggs & Co., the suit had not only been resisted, but dismissed, upon its merits, on demurrer.

When, on June 19, 1877, McDonald and White had been ordered to restore the fund *to the registry of the court*, (Rec., ff. 69–70,) the existence and validity of the lien had not only been repudiated and denied by their answer, but, upon the issues joined by replication to this answer, (Rec., f. 66,) the voluminous evidence on each side had been fully closed, and "*the cause*" certified to the general term, there "*to be heard* in the first instance." (Rec., f. 68.)

Such was the primary and original suit between the plaintiffs, on the one hand, and McDonald and White, on the other.

Out of the suit thus, upon the merits, contested and ordered *to be heard*—there subsequently arose against the defendants therein, a cause of complaint in nowise dependent upon the merits of the original controversy.

The subject-matter of the original suit *was not that which could be investigated in the incidental proceeding.*

And the legal operation of the final decrees in the two proceedings, would vary, inevitably, with the differences in the subject-matters involved in those proceedings.

It was in the power of the plaintiffs either to proceed to a hearing, upon the merits, in the original suit, or to content themselves with the lawful prosecution of the right thus incidentally arising in that suit.

And—from whatever motive—it was the merits of the original suit which the plaintiffs, upon deliberation, elected to renounce and abandon.

For disobedience to the interlocutory order passed on the 19th day of June, 1878, and requiring the fund to be restored *to the registry of the court*, (Rec., ff. 69–70,) McDonald and White stood in contempt.

And, on September 14, 1877, it was moved against them by the plaintiffs, that they show cause "why they and each of them should not *be punished for disobedience of the order* * * * as for a contempt." (Rec., ff. 70–71.)

The object and the result of the proceedings commenced by this motion, were to animadvert upon the conduct of McDonald and White, *without reference* to the merits of the principal suit.

Under those proceedings, their answer was stricken from the files, the evidence collected and filed in support of that answer, unvalued and ignored, and a peremptory decree rendered against them,—*on account of a specific contempt of judicial authority.*

The only controversy in the principal suit, had related to the existence and validity of the lien upon the bonds.

This was the *lis*, which was *pendens* at the time of the purchase of the bonds by Riggs & Co.

And it is with reference to such *lis*, that the obligation, if any, of the purchasers is to be measured.

See French, Trustee, *vs.* Hay *et al.*, 22 Wall., 246.
Union Pacific Railway *vs.* Wyler, 158 U. S., 298.

The transfer of property in litigation is not forbidden by law. But the law has precisely defined the extent and nature of the obligation which may be imposed upon the purchaser of such property. It is only so far as the judgment or decree against the alienor, deals with the *res* in controversy, that the judgment or decree becomes operative against the alienee.

"Purchasers *pendente lite* of non-negotiable property in litigation, are, *so far as the property is concerned*, deemed to stand in the situation of parties."

Bigelow on Estop., 60 (3d edit.).

"This rule being only applicable to suits which are in their nature actions *in rem*, the judgment rendered will not bind the purchasers personally, but will only affect *the property or interest which is the subject of litigation*."

Wade on Notice, Sec. 375.

If, in the *lis* pending at the time of the purchase made by Riggs & Co., the plaintiffs should establish a lien upon the bonds, the decree so rendered would be binding upon the securities, or their proceeds, in the hands of the firm.

This particular and limited liability, that firm might have willingly assumed.

They might have supposed themselves to be in possession of facts which must defeat any recovery in the suit. And though this supposition might prove to be erroneous, the extent and nature of their extremest liability were, at least, measurable in advance.

See The Oregon, 158 U. S., 206;
The Beaconsfield, *id.*, 311.

It is said in the opinion below:

"As purchasers *pendente lite*, Riggs & Co. took the risk of the litigation then pending, but, in so doing, did not assume the risk of any punishment that might be inflicted upon McDonald and White in an independent proceeding." (Rec., f. 205.)

But the purchaser *pendente lite* is affected by nothing which may be adjudged against his vendor, in an incidental proceeding, which, though arising out of the principal controversy, in nowise depends upon the merits of that controversy, but is conducted upon grounds peculiarly and obviously its own.

Such a proceeding, being neither by way of *amendment* nor of *supplement*, is, both in its nature and objects, distinct from the original suit.

It constitutes no part of the *lis* which was *pendens* at the time of the purchase.

It is a *lis* subsequently arising, and in nowise involving the merits of the principal cause.

"When a court commits a party for a contempt, their adjudication is a *conviction*, and their commitment in consequence is *execution*."

Ex parte Kearney, 7 Wheat., 43.

"A proceeding for contempt is a distinct and independent matter, as much so as a new suit, and requires distinct notices of proceedings to be given."

State vs. Matthews, 37 New Hamp., 454.
The First Congreg. Church, &c., vs. The City of Muscatine, 2 Clarke (Iowa), 71–72.

"The record of a conviction for contempt, is as distinct from the matter under investigation when it is committed, as an indictment for perjury is from the cause in which the false oath is taken."

Passamore Williamson's Case, 26 Pa. St., 9, 19.

This is true, even when the contempt is adjudged and the merits determined, in one and the same decree.

New Orleans vs. Steamship Company, 20 Wall., 392.

"It is not an interlocutory order made in the cause, much less an order adjudicating the principles of the cause."

Balt. & Ohio R. R. Co. vs. The City of Wheeling, 13 Gratt., 40, 57 (an. 1855).
Alderson vs. Commissioners, 32 West Va., 640, 648 (an. 1889).

That a final decree in the original suit, establishing the lien of the plaintiffs upon the bonds, should be binding upon the securities, or their proceeds, in the hands of purchasers pending that suit, may be conceded.

But it cannot thence follow, that such purchasers *became bail* for the good behavior of their vendors towards the court, during the continuance of the litigation.

The interlocutory order of June 19, 1877, had directed no payment *to the plaintiffs*.

It had required that the fund should be paid into *the registry of the court*, and, hence, in effect, *unto the court itself*.

The People vs. Spalding, 10 Paige, 287.

"Such orders are not adjudications upon the right of property, but are only made with reference to ultimate results, and virtually place the property *in custodia legis*, until the ultimate results are reached."

Ex parte Crenshaw, 80 Missouri, 447, 451.

"Orders of that kind," it is observed by Mr. Chief Justice Taney, "are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or di-

lapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree."

Forgay *et al. vs.* Conrad, 6 How., 204–205.

It will not be asserted, that the firm of Riggs & Co. became guilty of contempt, by reason of the contempt adjudged against their vendors for disobedience of an interlocutory order; that its members at Washington, might have been at once arrested under that adjudication, or that Mr. Elliott might have been delivered up thereunder, by any judicial magistrate of the State of New York, for commitment to jail in the District of Columbia, upon refusal to give bail to appear in that District.

Nor can it be justly pretended, that the decree which established the contempt of the vendors, had any relation to the existence or validity of the lien asserted by the plaintiffs.

The bonds had been purchased by Riggs & Co., on June 28, 1875, pending a controversy respecting the existence and validity of the lien.

It was not until June 19, 1887, (nearly two years afterwards,) that the fund was directed to be paid into the court.

The motion made by the plaintiffs, on September 14, 1877, (Rec., ff. 70–71,) for McDonald and White to show cause why

"*they should not be punished* * * * as for a contempt," in disobeying that direction, amounted to a new and different *lis*.

And the proceedings which, ignoring the evidence taken and filed in their behalf,—not only removed the answer of McDonald and White from the files, but, after resulting in a decree *pro confesso*, for want of the answer thus removed, converted the decree so rendered into a final decree,—are proceedings merely in that *lis* which was commenced by the motion of September 14, 1877, and repose only upon the adjudication of contempt.

And if the firm of Riggs & Co. were neither purchasers pending such latter *lis*, nor bound by such adjudication of contempt, they cannot be affected by any proceedings conducted in such *lis* and founded upon such adjudication.

But the purchase by Riggs & Co. of the bonds, on June 28, 1875, is sought, in effect, to be punished, *ex post facto*, under the decree pronounced against McDonald and White, on April 17, 1878, in final sentence of their contempt.

A decree of this court had enjoined one *Chiles* from setting up claim to certain bonds and coupons, liberty being reserved to each side, to apply for further directions in respect to the execution of the decree.

> Texas *vs.* White, 7 Wall., 742, 743;
> *In re* Chiles, 22 *id.*, 160, 161.

Upon his violation of such injunction, this Court was moved by the State of Texas for a rule upon Chiles to show cause,

1st. "Why he should not be dealt with as guilty of a contempt," in the premises; and

2d. "Why he should not by proper instrument convey to the said State, all his right, title and interest" to the Bonds. (22 Wall., 158.)

Adverting to the contention of "counsel in oral argument," that Chiles should be imprisoned for contempt, until he executed such conveyance, this Court, through Mr. Justice Miller, said:

"But the obvious answer to this is, that no such order or decree has been made, and defendant can be guilty of no contempt in not doing this until he has been ordered to do it, and he is aware of it. To make an order now, and then punish for contempt or disregard of it before it was made, is *ex post facto* legislation and judicial enforcement at the same moment."

In re Chiles, 22 Wall., 169.

2. It has long been settled, in this Court, that, in order to render a judgment or decree, in one suit, conclusive between the same parties, in another, the judgment or decree must be pronounced *upon the merits of the controversy.*

Walden et al. vs. Bodley et al., 14 Peters, 161;
Hughes vs. U. S., 4 Wall., 237;
Durant vs. Essex County, 7 *id.*, 109;
Smith vs. McNeal, 109 U. S., 430;
St. Romes vs. Cotton Press Co., 127 *id.*, 614.

That the decree of April 17, 1878, was not, in fact, a determination of the question of lien, upon the merits of the

original controversy, as between the plaintiffs, on the one hand, and McDonald and White, on the other, every intelligence will immediately recognize and admit.

And that that decree amounted, in point of law, to no such determination, has already been deduced from the circumstance, that the merits of the original controversy were voluntarily abandoned by the plaintiffs, in favor of special proceedings whereby McDonald and White might be "*punished*" "as for a contempt," without any judicial determination of the matters arising upon the pleadings and proofs.

Ensminger vs. Powers, 108 U. S., 302.

As was well said by Referee *Rollins*:

"There was no adjudication, nor was there pretence of adjudication, upon the actual merits of the matters in controversy, for the court had theretofore stricken the defendants' answer from the files, and had avowedly and distinctly pursued that course by way of punishing the defendants for their contempts in refusing to obey the court's order for the deposit of moneys in its registry." (Rec., f. 146.)

3. It is equally the rule in this Court, that, in order to render applicable the doctrine of *res judicata*, there must be identity, not only in the parties, but likewise, both in the thing demanded and in *the cause of demanding it.*

"The essential conditions, under which the exception of the *res judicata* becomes applicable, are the identity of the thing demanded, the identity of the cause of the demand

1st. "Why he should not be dealt with as guilty of a contempt," in the premises; and

2d. "Why he should not by proper instrument convey to the said State, all his right, title and interest" to the Bonds. (22 Wall., 158.)

Adverting to the contention of "counsel in oral argument," that Chiles should be imprisoned for contempt, until he executed such conveyance, this Court, through Mr. Justice Miller, said:

"But the obvious answer to this is, that no such order or decree has been made, and defendant can be guilty of no contempt in not doing this until he has been ordered to do it, and he is aware of it. To make an order now, and then punish for contempt or disregard of it before it was made, is *ex post facto* legislation and judicial enforcement at the same moment."

In re Chiles, 22 Wall., 169.

2. It has long been settled, in this Court, that, in order to render a judgment or decree, in one suit, conclusive between the same parties, in another, the judgment or decree must be pronounced *upon the merits of the controversy.*

Walden et al. vs. Bodley et al., 14 Peters, 161;
Hughes vs. U. S., 4 Wall., 237;
Durant vs. Essex County, 7 *id.*, 109;
Smith vs. McNeal, 109 U. S., 430;
St. Romes vs. Cotton Press Co., 127 *id.*, 614.

That the decree of April 17, 1878, was not, in fact, a determination of the question of lien, upon the merits of the

original controversy, as between the plaintiffs, on the one hand, and McDonald and White, on the other, every intelligence will immediately recognize and admit.

And that that decree amounted, in point of law, to no such determination, has already been deduced from the circumstance, that the merits of the original controversy were voluntarily abandoned by the plaintiffs, in favor of special proceedings whereby McDonald and White might be "*punished*" "as for a contempt," without any judicial determination of the matters arising upon the pleadings and proofs.

Ensminger vs. Powers, 108 U. S., 302.

As was well said by Referee *Rollins*:

"There was no adjudication, nor was there pretence of adjudication, upon the actual merits of the matters in controversy, for the court had theretofore stricken the defendants' answer from the files, and had avowedly and distinctly pursued that course by way of punishing the defendants for their contempts in refusing to obey the court's order for the deposit of moneys in its registry." (Rec., f. 146.)

3. It is equally the rule in this Court, that, in order to render applicable the doctrine of *res judicata*, there must be identity, not only in the parties, but likewise, both in the thing demanded and in *the cause of demanding it.*

"The essential conditions, under which the exception of the *res judicata* becomes applicable, are the identity of the thing demanded, the identity of the cause of the demand

and of the parties in the character in which they are litigants."

W. A. & G. S. P. Co. vs. Sickles, 24 How., U. S., 341–342;
Aurora City vs. West, 7 Wall., 102;
Lyon vs. Perin Manufacturing Co., 125 U. S. 700;
Reynolds vs. Stockton, 140 *id.*, 270.

The foundation of the present action, is the existence, on June 28, 1875, of a valid lien upon the bonds in favor of the plaintiffs.

But the contempt adjudged against McDonald and White, and for which their answer was stricken out, their proofs ignored, and the cause, thus, in effect, peremptorily determined against them, consisted, not in refusing to satisfy, or to recognize, *any lien of the plaintiffs*, but in failing to pay *into court*, to abide the decision upon the merits, a fund to which neither side had yet been decreed to possess the better right or higher equity.

The operative cause of the final decree, was the contempt of McDonald and White, in disobeying the interlocutory order for such payment. And this *cause* superseded and excluded, of necessity, all inquiry into the existence or validity of the lien asserted by the plaintiffs.

A conviction, upon proceedings for contempt, for an offense punishable under the general criminal code, is never pleadable in bar to a subsequent indictment for that offense.

For the same act may constitute more than a single

offense, and the offense punished through process of contempt, is not identical with the offense triable under the indictment.

U. S. *vs.* Houston, 2 Cranch C. C., 261;
In re Terry, 37 Fed. Rep., 651;
Ex parte Savin, 131 U. S., 267;
In re Debs, 158 *id.*, 564, 593–594.

In a civil controversy, the merits of proceedings conducted to punish a defendant for disobedience of an interlocutory order, occurring in the progress of the cause, are wholly different and distinct from the merits of the principal controversy, and an adjudication *upon the contempt*, cannot be *res judicata* upon the merits of the controversy in which the contempt occurs.

It was to a decree thus rendered in the District of Columbia, without reference to the merits, that, in a collateral proceeding against a citizen of New York, her courts are asked to lend the efficacy of *res judicata*. And *this*, when no such effect had at any time been sought for that decree, in the forum of its origin, against persons there residing and amenable to process.

II. If the Supreme Court of the District of Columbia transcended its authority, in rendering the decree in question, the decree is not merely erroneous, but absolutely void.

1. *Limitations upon the powers of courts of justice.*

"The operation of every judgment must depend," says Mr. Chief Justice *Marshall*, "upon the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined."

Rose vs. Himely, 4 Cranch, 269.
Lessee of Hickey et al. vs. Stewart, 3 How. U. S., 762.
Reynolds vs. Stockton, 140 U. S. 264–265.
7 *Robinson's Pract.*, 16.

"Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its mode of procedure and in the extent and character of its judgment."

Windsor vs. McVeigh, 93 U. S., 232.

"Though there may be jurisdiction, for certain purposes, in a cause, the jurisdiction may be exceeded in the judgment."

Williams *et al. vs.* Berry *et al.*, 8 How., U. S., 542;
Bigelow *vs.* Forrest, 9 Wall., 351.
In re Frederick, 149 U. S., 76;
In re Bonner, 151 U. S., 256.

"Every act of a court beyond its jurisdiction, is void."

Ex parte Reed, 100 U. S., 23;
In re Mills, 135 *id.*, 270.

"If a magistrate, having authority to fine for assault and battery, should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the

preliminary jurisdiction to hear and determine had never existed."

Id. ib.
Reynolds *vs.* Stockton, 140 U. S.. 265.

"Why void? Because he had no power to render such a judgment."

Ex parte Lange, 18 Wall., 176.
In re Bonner, 151 U. S., 256–258.

And where the ultimate judgment is founded upon any order or process which the court was without power to direct, the judgment itself is a nullity.

Lamaster vs. Keeler, 123 U. S., 376, 391.

Thus, it was held, that if the command in a writ of *mandamus* "was, in whole, in part, beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right to punish for any contempt of its unauthorized requirement."

Ex parte Rowland, 104 U. S., 612.

So, when a court of the United States "undertakes by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."

Ex parte Fisk, 113 U. S., 718;
Ex parte Terry, 128 U. S., 305.

2. *The question of jurisdiction is always examinable, collaterally.*

"A judgment may be erroneous and not void, and it may be erroneous *because* it is void."

Ex parte Lange, 18 Wall., 175.

The jurisdiction of the tribunal which has awarded a particular judgment, or decree, is not examinable, exclusively, *on error or appeal, or upon original proceedings for the vacation of the judgment or decree.*

In whatsoever country and court, and under whatever circumstances, a right is asserted under a judgment, or decree, the jurisdiction to render the judgment, or decree, of the tribunal which has awarded it, becomes the rightful subject of free and impartial inquiry.

Reynolds vs. Stockton, 140 U. S., 264–265.

" Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct, or otherwise, its judgment until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them."

Elliott et al. vs. Peirsol et al., 1 Pet., 340.

The subsisting judgment of every tribunal, acting within the sphere of its jurisdiction, is admitted to be exempt from collateral attack.

"But directly the reverse of this is true, in its relation to the judgment of any court acting beyond the pale of its authority."

Wilcox vs. Jackson, 13 Pet., 511.

"This decision runs through all the cases on the subject, and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Elliott et al. vs. Peirsol et al., 1 Pet., 340, 341;
Lessee of Hickey et al. vs. Stewart et al., 3 How., U. S., 762;
Williams et al. vs. Berry, 8 *id.*, 540–543;
Thompson vs. Whitman, 18 Wall., 467–468;
Kilbourn vs. Thompson, 103 U. S., 197–198;
7 *Robinson's Practice*, 109–113.

3. *In the national tribunals, jurisdiction over the subject-matter and the parties, is not the test of jurisdiction to render given judgments or decrees.*

"It is no answer to this to say,"—as, for instance, in a criminal case,—"that the court had jurisdiction of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case."

Ex parte Lange, 18 Wall., 176;
U. S. vs. Walker, 109 U. S., 267;
Hans Nielsen, Petitioner, 131 U. S., 182, 183, 184.

"The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct, as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to the particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise upon navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. * * * Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. * * *

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

Windsor vs. McVeigh, 93 U. S., 282–283;
Acc: *United States vs. Walker*, 109 U. S., 265, 267.
In re Bonner, 151 U. S., 257.
Tenney *vs.* Taylor, 1 App. Cas. D. C., 227.
Ex parte Bradley, 7 Wall., 364.

The order which, in U. S. *vs.* Walker, was held void, for excess of authority, upon a collateral proceeding, was an order made *by the Supreme Court of the District of Columbia.*

That case, moreover, derives special importance from the circumstance, that the sureties upon the bond of an administrator, are by this Court, held to be effectually concluded by decree against their principal.

Stovall *vs.* Banks, 10 Wall., 583.

It might be supposed that the Circuit Courts of the United States, or the Supreme Court of this District, could set aside their judgments, on motion, after the expiration of the Term, without giving rise to any more serious question than that of error *vel non*, in the orders of vacation.

Yet, it is held, "the question relates to the *power* of the Courts and not to the mode of procedure."

Bronson *vs.* Schulten, 104 U. S., 417.
Phillips *vs.* Negley, 117 U. S., 671, 672, 673, 674.

It might be inferred, that a Federal tribunal, in rendering a given judgment, had conformed that judgment to what it conceived to be, and had decided to constitute, the issues in the action, yet, if the judgment be, in fact, beyond these issues, it is, and must be held, a nullity.

Reynolds *vs.* Stockton, 140 U. S., 265.

And it might be assumed, that administration granted by the proper Probate Court, upon the estate of a person absent from his home and unheard of for more than seven years,

and, hence, presumptively, deceased, would be valid in favor of a *bona fide* purchaser of property sold, in the course of such administration, under the direction of that Court; yet, if the absentee be, in fact, alive, at the time of the grant of such administration and sale thereunder, the administration and sale are equally nullities.

Scott *vs.* McNeal, 154 U. S., 34.

The faith and credit due, in the tribunals of New York, to the decree rendered in this District against McDonald and White, were the faith and credit which belonged to that decree, in the Courts of the United States, under the course of decision there fixed and established, and this course of decision conclusively determines, that a decree in excess or in violation of the powers conferred upon the Court which renders it, is simply void, whether upon direct or upon collateral proceedings.

Did the Supreme Court of the District of Columbia transcend its authority, in the decree which it pronounced against McDonald and White?

III. The decree against McDonald and White, punished them for contempt, by denying them a hearing, in violation of the laws of the United States.

1. *The denial of hearing, here intended, explained.*

The fugitive contemnor, it was held by the Supreme Court of the District, in passing upon the motion made by McDonald and White, on September 14, 1877, "*cannot be further permitted to prosecute or defend his suit* until he purges himself of his contempt."

Hovey vs. McDonald, 3 MacA. (D. C.), 186.

In the contention that McDonald and White were *denied a hearing*, is not now intended to be conveyed any complaint either that they were excluded from *favor* or *indulgence* in the tribunal whose orders they had disobeyed, or that they were refused merely *the privilege of oral or written argument.*

The broad and important signification which it is the purpose of the Brief to attach to this contention, whenever advanced, is that McDonald and White were *denied a hearing, in the sense that they were deprived of the judgment and consideration of the Court, upon their case as presented and closed upon the pleadings and the evidence.*

2. *The power of the Courts of the United States to punish contempts of their authority, is limited, by statute, to fine or imprisonment.*

(*a.*) When the inferior tribunals of the Union should be brought into existence, under the 1st section of the 3rd Article of the Constitution, their jurisdiction and powers would depend, in general, upon the affirmative action of Congress.

Ex parte Smith, 94 U. S., 456;
Bors vs. Preston. 111 *id.*, 255;
M. C. & L. M. Railway Co. vs. Swan, id., 283.

And to enable those tribunals to inflict penalties or punishments, for particular acts, it would first be necessary for Congress to render such acts criminal, and to define the penalties and punishments therefor.

1 Kent's Com., 335;
Manchester *vs.* Massachusetts, 139 U. S., 240;
U. S. *vs.* Eaton, 144 *id.*, 687.

There were certain powers, however, with which the Federal tribunals would become vested, *ex necessitate rei*, immediately upon their creation, and without the aid of statutory expression.

Such were the powers—inherent in all courts of record—to enforce the observance of order, to imprison for contumacy and to *fine for contempt.*

U. S. vs. Hudson and Goodman, 7 Cranch, 34;
Ex parte Crane, 5 Pet., 210;
Tennessee vs. Davis, 100 U. S., 275;
Ex parte Terry, 128 *id.*, 303;
Eilenbecker vs. Plymouth County, 134 *id.*, 36;
In re Debs, 158 *id.*, 595–596.

Amongst the amendments of the Constitution which had been proposed by Congress, in compliance with the recommendations from the States, was that,—drawn from the Declaration, and from the Bill, of Rights, of the Revolution

of 1688,—by which the judiciary of the Union would be prohibited, under all circumstances, from imposing *excessive fines* as well as from inflicting unusual punishments.

Hallam Const. Hist., ch. XV;
1 Story Const., sec. 303, note 3, (4th ed.);
2 *id.*, sec. 1903;
3 Ell. Deb., 591–593;
Grigsby's Va. Conv., 1788, pp. 69–70;
5 Marsh. Life Wash., 207.

But, in the absence of any regulation by Congress, the implied powers of the Federal tribunals to correct contempts of their authority, might not only be differently interpreted, but extended, in particular instances, beyond reasonable limits.

There could be no common law for the United States as a Nation.

The only legal principles which could pervade the Union, as rules of decision, were such as might be found in the Constitution, in treaties and Acts of Congress.

To secure uniformity in the construction of these powers, and to determine their boundaries by positive law, were objects of obvious importance, in the establishment of a judicial system for a people jealous of their liberties, intent upon the limitation of all public authority, and accustomed to believe that "if judgments were to be the private opinions of the judge, men would then be the slaves of their magistrates."

(*b.*) The first session of the first Congress, in creating a Federal judiciary, provided, therefore, as follows:

"All the said Courts of the United States* shall have power to punish, by *fine or imprisonment*, at the discretion of said Courts, all contempts of authority in any cause or hearing before the same."

Act Cong., Sept. 24, 1789, sec. 17;
1 Stat., 83.

This provision of the Judiciary Act, was thus re-enacted and qualified in Rev. Stat. U. S., sec. 725:

"The said Courts shall have power to impose and administer all necessary oaths, and to punish by *fine or imprisonment*, at the discretion of the Court, all contempts of their authority, *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts, in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

In re Debs, 158 U. S., 600.

By this legislation, the power of the Federal tribunals to punish contempts of their authority, *was limited to fine or imprisonment.*

---

*No application of this enactment, nor of Rev. Stat. U. S., sec. 725, is intended to be made, in respect to *this* Court, which, it is said, "derives its existence and powers from the Constitution." (19 Wall., 510.)

The cases to which this power should be construed to extend, were defined and limited in the *Proviso*, which was taken from the act of Congress., March 2, 1831, sec. 1, (4th Stat., 487,) a statute which was supposed by Chancellor *Kent*, to have effected "a very considerable, if not injudicious, abridgment of the immemorially exercised discretion of the courts in respect to contempt."

1 Kent, Com., 300, note *d*.

(*c.*) *The Supreme Court of the District of Columbia is a court of the United States, within the meaning of United States Revised Statutes, section 725.*

By act of Congress February 13, 1801, "to provide for the more convenient organization of the Courts of the United States," * (2 Stat., 89,) it was enacted in section 10 that the Circuit Courts should have, and were thereby invested with, all the powers theretofore granted by law, to the Circuit Courts of the United States, unless where otherwise provided by that act. (2 Stat., 92.)

As the original Circuit Courts of the United States were limited, by section 17 of the Judiciary Act, in their punishment of contempt, to fine or imprisonment, the Circuit

* "This was the famous Judiciary Act, passed in the last days of Mr. Adams' administration, and increasing the number of Federal judges, which gave so much dissatisfaction at the time, and which was repealed in the beginning of Mr. Jefferson's administration." (2 Bent. Abr., 427, *note.*)

Courts created under the act of February 13, 1801, became, under its tenth section, subject to the same limitation.

By act of Congress February 27, 1801, section 3, there was established a Circuit Court for the District of Columbia, the said court and all the judges thereof to "have all the powers by law vested in the circuit courts and the judges of the Circuit Courts of the United States." (2 Stat., 105.)

And the Circuit Courts intended in section 3 of the act of February 27, 1801, were the Circuit Courts created under the act of February 13, 1801, and not those embraced in the act of Congress April 29, 1802, (2 Stat., 156,) repealing, in effect, the act of February 13, 1801, and restoring, substantially, the Circuit Courts created under section 4 of the Judiciary Act of 1879. (1 Stat., 74.)

Voss *vs.* Luke, 1 Cr. C. C., 333.
U. S. *vs.* Williams, 4 *id.*, 377.
U. S. *vs.* Kendall, 5 *id.*, 185.
Kendall *vs.* U. S., 12 Peters, 624–625.

Hence, the Circuit Court for the District of Columbia was limited, under section 17 of the Judiciary Act of 1789, in the punishment of contempt, to fine or imprisonment.

In 1824, it was, indeed, left undetermined by the Circuit Court of this District, whether *a justice of the peace*, for the District, was *a judge of the United States*, within the meaning of the third article of the Constitution.

Davidson *vs.* Burr, 2 Cranch C. C., 515.

Nor should the doubt thus arising be regarded, at this day, with too little composure, when it is remembered, that, at February Term, 1806, *this* Court, speaking through Mr.

Chief Justice Marshall, and reversing the judgment of the Circuit Court of the District of Columbia, had adjudged that a justice of the peace for that District, was *an officer of the Government of the United States*,—

Wise *vs.* Withers, 3 Cranch, 331,—

and that, in 1813, and, apparently, upon such the ruling of *this* Court, the Circuit Court of the District had held *a sail-maker*, at the Washington navy yard, appointed by warrant under the hand of the Secretary of the Navy and the seal of the Navy Department, to be *an officer of the United States*.

Sanford *vs.* Boyd, 2 Cranch C. C., 78.

But certain it is, that the Circuit Court of the District of Columbia, as well as *this* Court, had uniformly regarded the former tribunal, while in existence, as a Circuit Court *of the United States*, and as subject to the provisions, when applicable, of the Judiciary Act of September 24, 1789.

Thus, it was considered by the Circuit Court for the District, that that Court was affected by section 5 of that act, (1 Stat., 75,) respecting special sessions of the Circuit Courts, (U. S. *vs.* Williams, 4 Cranch, 372;) by section 14 of that act (1 Stat., 81–82,) conferring power upon "all the beforementioned courts of the United States" to issue certain specified writs, and such other writs as might be necessary for the exercise of their respective jurisdictions, &c.; (Voss *vs.* Luke, 1 Cranch C. C., 108;) by section 15 of that act, (1 Stat., 82,) empowering "all the said courts of the United States" to compel the production of books and writings; (Maye *vs.* Carberry, 2 Cranch C. C., 336;) by section 30 of that act, (1 Stat., 88–89,) respecting the taking of depositions in civil causes depending "in any district in any court of the United States;" (Garrett *vs.* Woodward *et al.*, 2 Cranch

C. C., 191; Edmondson *vs.* Barrill, *id.*, 232–233;) and by section 6 of act of Congress, March 2, 1793, respecting subpœnas for witnesses who might be "required to attend a court of the United States." (Voss *vs.* Luke, 1 Cranch C. C., 335–336; U. S. *vs.* Williams, 4 *id.*, 388.)

And the Circuit Court for the District recognized as applicable to itself, not only the 17th section of the Judiciary Act of 1789, (1 Stat., 83,) respecting the *punishment of contempts*, (Voss *vs.* Luke, 1 Cranch C. C., 333,) but also pointedly, and immediately upon its passage, the act of Congress of March 2, 1831, (4 Stat., 487–488,) defining, (sec. 1,) the cases to which "the power of the several courts of the United States" to issue attachments and inflict *summary punishments for contempts*, should be considered to extend. (U. S. *vs.* Emerson, 4 Cranch C. C., 188, Dec. T, 1831.)

So, *this* Court treated as applicable to the Circuit Court for this District, section 15, (Thompson *vs.* Selden, 20 How., 194,) and section 30, (Beale *vs.* Thompson *et al.*, 8 Cranch, 70,) of the Judiciary Act of 1789, section 22 of the same act (1 Stat., 84) authorizing the review, on error, by *this* Court, of the decision of the circuit court in a civil cause of admiralty and maritime jurisdiction brought from the district court to the circuit court, and, also, section 2 of the act of Congress of March 3, 1803, (2 Stat., 244,) reducing the amount in controversy requisite for appeals to the circuit courts from the judgments or decrees "of the district courts of the United States." (U. S. *vs.* Nourse, 6 Pet., 495–496.)

By act of Congress of March 3, 1863, section 1, (12 Stat., 762–'3,) there was established for this District a *Supreme Court*, which, by section 3, (12 Stat., 763,) was to "possess the

same powers and exercise the same jurisdiction as "had been "possessed and exercised *by the circuit court of the District of Columbia*," which latter court, by section 16, (12 Stat., 764,) was abolished, though all laws or parts thereof, relating to the circuit court of the District, so far as they were applicable to the Supreme Court of the District, were retained in force.

And at December term, 1868, it was assumed by this Court, speaking through Mr. Justice Nelson, then its senior member in commission, that the act of Congress of March 2, 1831, section 1 (4 Stat., 487–488), defining the cases to which should be construed to extend "the power of the several courts of the United States" to issue attachments and inflict summary punishment for contempts, was applicable to the Supreme Court of the District of Columbia—(*Ex parte* Bradley, 7 Wall., 364, 372, 374,)—just as that enactment had been previously deemed applicable to the Circuit Court for the District, by the latter court itself. (U. S. *vs.* Emerson, 4 Cranch C. C., 188, *supra.*)

But, as the Circuit Court for the District of Columbia was vested, under section 3 of the act of February 27, 1801, (*supra,*) with the powers *of the circuit courts in general*, and as the Supreme Court of the District of Columbia, by act of March 3, 1863, section 3, (*supra,*) was vested with the powers and jurisdiction which belonged to *the circuit court for the District of Columbia*, it was deemed proper by Congress, in revising the Statutes of the United States relating to that District, to present the situation in a simple view, and, in such revision, to enact as follows:

"SEC. 760. The Supreme Court shall possess the same powers and exercise the same jurisdiction as the *Circuit Courts of the United States.*"

The truth is, that a Circuit Court erected by Congress within a State, and there exercising judicial power under the third Article of the Constitution of the United States, and a Circuit Court, or a Supreme Court, erected by Congress within this District, and there exercising judicial power, be it under that Article, under section 8 of the first Article, or under section 3, of the fifth Article, of the Constitution, are equally courts of the United States.

Ex parte Norvell, 20 D. C. (9 Mack.) Rep., 348, 353.

"That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress."

Embry *vs.* Palmer, 107 U. S., 3, 10.

(*d.*) *Though the Supreme Court of the District of Columbia be not a court of the United States, section 725 of the Revised Statutes of the United States is, nevertheless, operative within that District.*

In the legislation already examined, the purpose of Congress to maintain as much uniformity between the powers and jurisdiction of the judicial tribunal established under their authority for the District of Columbia, and the powers and jurisdiction of the Circuit Courts, in general, as the peculiar relation of the United States towards that District might conveniently admit, has been constantly manifested.

But by the act of Congress of February 21, 1871, section 34, (16 Stat., 426,) re-enacted in the Revised Statutes of the District of Columbia, section 93, it is thus expressly provided:

"The Constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the District, as elsewhere within the United States."

U. S. *vs.* Guiteau, 1 Mackey (D. C.), 530;
In re Attach. of Spencer, MacA. & Mack. (D. C.), 447;
Ex parte Norvell, 20 D. C., 354.

And "it seems impossible for more comprehensive or more definite language to be used."

U. S. *vs.* Dunn, 3 Mackey (D. C.), 153.

Under this section, it was held, that section 858, Revised Statutes of the United States, relating to the incompetency of parties, as witnesses, in certain actions, was applicable in the Supreme Court of this District, notwithstanding the provisions cognate to the section last mentioned, contained in Revised Statutes of the District of Columbia, sections 876, 877.

And the distinction between the application to the Supreme Court of the District of Columbia, of the general statutes of the United States and the application of those statutes to the *territorial courts*, whose practice and proceedings were regulated by territorial enactments, was fully pointed out by *this* Court, speaking through Mr. Justice Harlan.

Page *vs.* Burnstine, 102 U. S., 664;
See McAllister *vs.* U. S., 141 U. S., 174, 184.

On the other hand, it was held by *this* Court, that section 1007, Revised Statutes of the United States, relating to supersedeas and execution, on error, or appeal, did not apply to the Supreme Court of this District, because that Court had been empowered, under Revised Statutes of the District of Columbia, section 772, to adopt rules of its own to regulate the time and manner of making appeals, and to prescribe the terms and conditions upon which appeals might be made, and had adopted rules accordingly, and that those rules and the enactment under which they had been promulgated, covered the entire subject.

Hovey *vs.* McDonald, 109 U. S., 150, 156, 159.

Page *vs.* Burnstine (*supra*) presented far more persuasive suggestions for conceiving Revised Statutes of the United States, section 858, to be locally inapplicable to this District, than can be found for supposing that Revised Statutes of the United States, section 725, was or is thus there inapplicable.

For, from the year 1874 to the year 1879, both years inclusive, there existed no Rule of that Court, (Rec., ff. 92, 125), nor any prescribed by *this* Court, (Rec., ff. 96, 126), *in relation to contempts*, save and except upon sequestration and attachment.

And if section 725, Revised Statutes of the United States, be "locally inapplicable" to the District of Columbia, then are the local judicial tribunals of that District uncontrolled by positive law, in a power at once the most delicate and the most transcendent that can be exercised by courts of justice.

The restraint imposed by that section upon punishments for contempt, is admitted to operate upon the judicial system in general, erected under national enactment.

Is such restraint inapplicable to the tribunals which may exist or be created within the District of Columbia, and was it solely to the Supreme Court of that District, or to Courts in the Territories, that Congress intended to intrust the right of punishing, *without limit*, contempts of judicial authority?*

It is submitted, on the whole, that the punishment which might lawfully be inflicted by the Supreme Court of the District of Columbia, upon McDonald and White, for their contempt of its authority, was such only as might be lawfully inflicted, in like case, by the courts of the United States, in general.

(*e.*) In 1821, *this* Court thus referred to the operation of the Judiciary Act of 1789, upon the power of the Federal tribunals to punish for contempt:

"It is true that the courts of Justice of the United States are vested, by express statutory provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the Statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for

*Of the 104 cases from that Court, here decided upon their merits, from its organization down to April 22, 1878, (five days later than the date of the final decree rendered by that Court against McDonald and White,)—from Thompson *vs.* Bowie, 4 Wall., 463, to Risher *vs.* Smith, 131 U. S. Appx. CLVI—forty-seven had been reversed.

contempt *shall not extend beyond its known and acknowledged limits of fine and imprisonment.*"

Anderson vs. Dunn, 6 Wheat., 227–228.

And, in 1873, this court, upon awarding a *mandamus* to compel a District Court of the United States to vacate an order whereby it had *disbarred* an attorney, as a *punishment for contempt*, thus finally interpreted the operation of the statute:

"The law happily prescribes the punishment which the court can impose for contempts. The seventeenth section of the Judiciary Act of 1789, declares that the court (sic) shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. *The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other methods of punishment.* The judgment of the court disbarring the petitioner, treated as a judgment for contempt, was, therefore, unauthorized and void."

Ex parte Robinson, 19 Wall., 512.

Accord: *U. S. vs. Memp. & L. R. R. Co.*, 6 Fed. Rep., 239, per *Hammond*, J.;
In re Cary, 10 *id.*, 625, per *Brown*, J.;
U. S. vs. A. T. & S. F. R. R. Co., 16 *id.*, 853, per *McCrary*, J.;
Kirk vs. Milw. Dust Col. Manuf. Co., 26 *id.*, 508, per *Dyer*, J.;
U. S. vs. Jose, 63 *id.*, 954, per *Hanford*, J.

Ex parte Robinson is cited with approval in two recent cases in this Court.

Interstate Com. Comm. vs. Brimson, 154 U. S., 489;
In re Debs, 158 *id.*, 596.

(*f.*) It is, indeed, true, that "the *exercise* of this power has a two-fold aspect, namely, first the proper punishment of the guilty party for his disrespect to the court, or its order; and the (*sic*) second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should *be fined and imprisoned* (*) until he performs the act required of him, or shows that it is not in his power to do it."

In re Chiles, 22 Wall., 168;
Eureka Lake Company vs. Yuba County, 116 U. S., 417.

(*) It has been well explained, that commitment, until payment of fines, is not inconsistent with the statute, though the same be in the *disjunctive*, since the commitment must terminate, upon the payment.

Fischer vs. Hayes, 6 Fed. Rep., 63, 19 *id.*, 13, 18;
Acc: *Ex parte* Crittenden, 62 California, 535, (an. 1881.)

See, *In re Chiles*, 22 Wall., 157, 169, where a fine of $250, to be paid to the United States, was imposed upon *Chiles*, with costs, and the contemnor committed to the custody of the marshal, until payment of such fine and costs.

And though this case arose in the exercise of the original jurisdiction of this court, the court appears to have treated section 725, Revised Statutes of the United States, as applicable to the contempt. (22 Wall., 168.)

But the nature of the power is, in both cases, the same, though the object with which it is exercised, may vary in each.

If the power be punitive when directed against an individual, "for his disrespect to the court or its order," it is equally punitive when he is "*fined and imprisoned*," during disobedience to the order.

And the power itself, with whichever of these objects it may be exercised, is still limited by the statute *to* fine or imprisonment.

(3.) The plea of *circumstances*, cannot justify the punishment inflicted upon McDonald and White.

It may be contended, however, that the absence of McDonald and White from the District of Columbia, disabled the Supreme Court of that District from inflicting upon them any other punishment than such as was actually awarded against them.

This contention, if well founded, might, indeed, prove, that the laws of the United States had provided no sufficient means for the punishment of contempts, in some particular conjunctures, but the argument could have no tendency to establish the jurisdiction of the Supreme Court of this District to supply the deficiencies in legislation, by inventing new methods for the punishment of McDonald and White.

"The power of punishment," under national authority, "is *alone* through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country or endangered its safety."

Ex parte Milligan, 4 Wallace, 119.

But the contention itself is erroneous, since the contemnors were liable to *indictment* in the District of Columbia, and might be arrested, imprisoned or held to bail, in any portion of the United States, with a view to their trial in that District. (*Post*, APPENDIX A, pp. 153–154.)

When, in a criminal cause, the plaintiff in error is a fugitive, without bail, *this* Court will direct the removal of the cause from its docket, until he submit to the jurisdiction of the court below.

Smith *vs.* U. S., 94 U. S., 97.
Bonahan *vs.* Nebraska, 125 *id.*, 692.

It does not *here* punish him, by dismissing the writ of error.

The argument against the decree, *on the ground of its violation of the statute law*, here properly terminates.

The discussion which further follows, under this head, is but by way of reply to what, in the light of experience, may be anticipated from the plaintiff in error.

4. *The decree in question derives no support from any law of Maryland, in force in the District of Columbia.**

It may be said, however, that the laws of Maryland were retained by Congress, in force in the District of Columbia; that amongst such laws was *the common law* of England, and that the decree which, in effect, denied McDonald and White a hearing, on account of their contempt, was agreeable to the course of the common law.

(*a.*) *How far the laws of Maryland have been continued by Congress in force in this District.*

---

*It is not necessary to consider how far the written and unwritten law of the State of Maryland, prevailing in the District of Columbia, could be judicially noticed by the courts of New York, nor, hence, how far such laws can be noticed on the present writ of error.

It is true, that by section 92, Revised Statutes of the United States, relating to this District, it is thus provided:

"The laws of the State of Maryland, *not inconsistent with this Title*, as the same existed on the twenty-seventh day of February, eighteen hundred and one, except as modified or repealed by Congress, or by authority thereof, or until so modified or repealed, continue in force within this District."

And it is conceded, that *the common law*, so far as the same prevailed in that State, on the 27th of February, 1801, is included within the laws so continued in force.

But the laws thus continued in force, are such only as are not *inconsistent with the Title in which the section thus quoted occurs*, and as have been neither *modified* nor repealed by Congress; and it has already been shown, (Ante, p. 65) that, by section 93 of such Title, "the Constitution and all the laws of the United States which are not locally inapplicable" to the District of Columbia, are to prevail as effectually at the seat of government, as throughout the Union in general.

As section 725 of the Revised Statutes United States, limiting the powers of the Federal judiciary, in general, in cases of contempt, has been shown not "*locally inapplicable*" to the District of Columbia, the common law, as adopted in Maryland, must be viewed, if it differ from that section, as modified or repealed by the same.

The common law of England has not been adopted, however, in all its diversities, either in the District of Columbia, or in any of the States of the Union.

Van Ness vs. Pacard, 2 Pet., 144;
Wheeler vs. Smith et al., 9 How., U. S., 78.

And if the power exercised by the Supreme Court of this District, on account of the contempt committed by McDonald and White, could be justified upon any principle of the common law prevailing either in Maryland or in the District of Columbia, it is natural to suppose that some memorial would exist of the principle.

(*b.*) But, at the time of the settlement of the State of Maryland, the summary jurisdiction exercised by the common-law tribunals of England, over contempts of their rules and orders, was limited to *fine and imprisonment*, upon attachment.

Bac. Abr. Attach. A., Vol. 1 (Lond. ed., 1832), p. 389;
Id. Vol. 1 (Philad. ed., 1856), p. 456;
2 Hawk. P. C., ch. 22, sec. 37 (8 Lond. ed., p. 222);
See Tidd's Pr., 437–438 (2 Am. ed., ed. 1807);
1 *Id.*, 478–482 (4th Am. ed.);
2 Arch. Chit. Q. B. Pr., 1711 (12th Lond. ed.).

Nor is there to be found any decision by a Court of Maryland, which professes to derive from the common law of England, a more extensive jurisdiction over any such contempts.

And no such decision—not even in the case under review—has proceeded from the local courts of this District.

(*c.*) But the Supreme Court of the District of Columbia, in denying to McDonald and White all right to be heard, on account of their contempt, was sitting, not as a court *of law*, but as a court of *equity*, and it would have been unlawful, even had it been attempted, for the local tribunal of the District to confound the remedies which were appropriate to these distinct systems of remedial justice.

Willard vs. Wood, 135 U. S., 314.

(*d.*) If we turn to the statutes of Maryland in force in the District of Columbia, no justification will be found for such a proceeding *in equity*, as was conducted against McDonald and White. For the order, for non-compliance wherewith, those defendants were denied a hearing, was but an *interlocutory* order, passed in advance of any determination of the merits of the controversy, and directing the fund to be delivered,—not to the plaintiffs—but to the registry of the court.

The statutes of Maryland adopted in the District of Columbia, for the enforcement *of interlocutory rules and orders in chancery*, are collected in APPENDIX B, (*Post*, pp. 155–163,) and give no countenance whatever to the proceeding in question.

It is in vain, then, that the laws of the State of Maryland are invoked to support the jurisdiction assumed by the Supreme Court of this District.

The laws enacted by that State prior to the year 1801, so far as they empower her court of equity to enforce compliance with its interlocutory orders and decrees, limit and restrict the exercise of that power *to fine and imprisonment.*

(*e.*) It may be added, that the twenty-first Article of the Maryland Declaration of Rights, which provides, that "No freeman ought to be taken or imprisoned, &c., or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land," is at once the language *of magna carta* and the equivalent, upon the subject it embraces, of the Fifth Amendment to the Constitution of the United States, and that it was in subordination both to this Article and to this Amendment, that the laws of that State became operative within the District of Columbia.

Bank of Columbia vs. Okely, 4 Wheat., 241–242.

There *could* be adopted, therefore, in the District of Columbia, no law of Maryland which gave, as a civil remedy, to one party, the right of depriving the other of a hearing, in a court of justice.

(*f.*) By Act of Congress February 27, 1801, section 3, (2 Stat., 105,) a judicial tribunal had been established, as we have seen, for the District of Columbia, to be known as the *Circuit Court* for that District, and this tribunal, by Act of Congress, March 3, 1863, section 1, (12 Stat., 762,) was superseded by the present *Supreme* Court of the District of Columbia.

If we resort to the course of judicial decision in the *Circuit* Court for that District, we shall find no precedent for the orders by which, on account of their contempt, McDonald and White were denied all right of contesting the justness of the claim asserted against them.

The interlocutory orders and decrees of the Circuit Court for this District, were enforced, when disobeyed, only *by fine or imprisonment.*

Monroe vs. Harkness, 1 Cranch C. C., 157;
Voss vs. Luke, 1 *id.*, 338, *note;*
Monroe vs. Bradley, *id.*, 158;
U. S. vs. Emerson, 4 *id.*, 188;
U. S. vs. Williams, 4 *id.*, 386;
Negro Thornton vs. Davis, 4 *id.*, 500;
See, also, *Negro Richard vs. Van Meter*, 3 *id.*, 214.

Nor can any such precedent be extracted from the reported decisions of the *Supreme Court* of the District of Columbia.

See, in the Matter of Richard H. Marsh, 1 McA. & Mack, Rep., 32.

In the history of that Court, the jurisdiction which it exercised on account of the contempt committed against *itself*, by McDonald & White, is approached only by the jurisdiction which it exercised on account of the contempt committed by Mr. *Bradley* against *another and different tribunal.*

Ex parte Bradley, 7 Wall., 364;
Bradley vs. Fisher, 13 *id.*, 335.

IV. *The proceedings and decrees had against McDonald and White, on the ground of their contempt cannot be viewed as merely civil remedies.*

It may be contended, however, that the removal of the answer of McDonald and White from the files, on account of their contempt, and the subsequent proceedings conducted against those defendants, are not to be considered as the infliction of *punishment*, but as the enforcement of a civil remedy in favor of the plaintiffs.

1. The proceedings were conducted under a motion *for punishment*, and the final decree must be construed with reference to the object thus sought.

It is not to be denied, that this removal of the answer was decreed in consequence of the motion filed by the plaintiffs for a rule upon McDonald and White to show cause why they "should not be *punished* for *disobedience* * * * as *for a contempt*," that the punitive object of this rule is expressly recognized in the order passed thereon, on the 8th day of December, 1877, and that the decree *pro confesso* recites, in effect, that the answer was, in fact, stricken from the files, *on the ground of contempt.*

The issue involved, and the object sought in the motion of September 14, 1877, were the *punishment* of the delinquents for a specific contempt of judicial authority.

And however general the terms of any decree founded upon that motion, the decree must be construed and limited, with reference to the issue thus involved, and the object thus sought, in the motion.

Graham *vs.* Railroad Company, 3 Wall., 710.
Barnes *vs.* Chicago, &c., Railway, 122 U. S., 14.

Neither the proceeding instituted by the plaintiffs on September 14, 1877, to have both McDonald and White "*punished* * * * as for a contempt," nor the orders and de-

crees obtained under that proceeding, can be altered or disavowed to meet the exigencies of the present situation.

See *Hovey vs. McDonald*, 3 McA. (D. C.), 185.

2. To support the claim that the proceedings and decree were civil, they must be civil *in substance and effect*, and not merely in form.

If, under color of civil proceedings, these defendants were, *in effect*, punished in a manner prohibited by the Constitution or laws of the United States, the invalidity of the proceedings is shown in the consequences which attended them.

The inhibitions imposed by national authority—the privileges and immunities which it secures—cannot be defeated, or impaired, by means of mere forms and ceremonies.

Brown *vs.* State of Maryland, 12 Wheat., 444;
Cummings *vs.* State of Missouri, 4 Wall., 319, 329;
Kring *vs.* Missouri, 107 U. S., 233.

On the trial of a civil information filed, under the Act of Congress of June 22, 1874, in the District Court for the Southern District of New York, for the seizure and forfeiture of certain cases of plate glass, the owner, under the pro-

visions of that statute, was required, on pain of judgment *pro confesso, to produce the invoices* of the cases.

The judgment of forfeiture in the trial court, though affirmed in the Circuit Court, was reversed in *this* Court, where it was held, that the provision of the statute authorizing the judgment *pro confesso*, in case of the non-production of the invoices, was tantamount to a provision requiring their production, and hence, in conflict both with the Fourth and with the Fifth Amendments of the Constitution.

Mr. Justice Bradley admitted, in delivering the opinion of this Court, that it had to deal "with an act which expressly excludes criminal proceedings from its operations," "and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this," he, nevertheless, inquired, "relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; they are both within the spirit."

Boyd *vs.* United States, 116 U. S., 616, 621–622.

"If an indictment had been presented against the claimants, upon conviction, the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimant—that is, civil in form—can he by this device take from the proceeding its criminal

aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one."

Id., 634.
Lees *vs.* U. S., 150 U. S., 476, 480–481.

3. *Of the punitive purposes, as well as the punitive nature, in fact,* of the proceedings against McDonald and White.

(*a.*) The final decree of April 17, 1878, (Rec., pp. 57–58,) reposes wholly upon the decree *pro confesso* of the 12th of February, 1878. (Rec., p. 56.)

The decree *pro confesso* was awarded for want of an answer.

Yet a complete answer had been interposed by McDonald and White, as early as May 2, 1876. (Rec., pp. 33–49.)

And to this answer the complainants had, four days afterwards, filed a *general replication.* (Rec., p. 50.)

Upon the issues joined by this replication, voluminous depositions had been taken on behalf of McDonald and White, as well as on the part of Hovey and Dole, and proof had been closed, on both sides, as early as February 21, 1877. (Ex. 1, pp. 1485, 1488.)

And "the cause," thus completed, had, on April 18, 1877, been "certified to the general term, there *to be heard*, in the first instance." (Ex. 1, p. 309.)

It was not until the 19th of June, 1877, (Ex. 1, pp. 311–312, Rec., p. 52,) that McDonald and White had been directed to make restitution of the fund to the registry of the court, and, hence, not until after that date, that any disobedience, or contempt, could be charged against them.

The initial movement against McDonald and White, for their refusal to obey the order of the Court, was the motion filed by the plaintiffs on the 14th of September, 1877. (Rec., pp. 52–53.)

It was the object of that motion, as expressed in its terms, to obtain a rule, or order, to compel those defendants to show cause why they "*should not be punished* for disobedience of the order, * * * *as for a contempt.*"

That it was upon *this specific motion*, and "*upon consideration thereof*," that the Supreme Court of the District made

absolute *that particular rule, or order, sought in such motion*, is not left to be presumed from the ordinary course of judicial proceedings.

It is recited in the body of the decree of December 8, 1877, that "*the* motion made by the complainants for *a rule* upon the defendants to *show cause* why they should not be decreed to *be in and punished for a contempt* * * * came on to be heard * * * and thereupon, upon consideration *thereof*," it was decreed "that *the said* rule be made absolute," that the defendants be deemed in contempt, and that in case of their failure, for six days, to pay the fund into the registry of the Court, their answer be stricken from the files, and the cause proceed as if no answer had been filed, and that until their compliance with the order they had already disobeyed, all proceedings on their part should be perpetually stayed. (Rec., pp. 53–54.)

The object of the motion and the nature and finality of the rule—the adjudication of the contempt and the punishment inflicted therefor, upon consideration of the motion and in consequence of the absoluteness of the rule—all here appear.

See *Hovey vs. McDonald*, 3 McA. (D. C.), 185.

It was under proceedings had under this decree, thus originating and operating, and *for the continuance of the contempt* therein adjudged, that the answer of the defendants was stricken from the files.

And the absence, thus occasioned, of their answer, was the special and acknowledged ground of the decree *pro confesso* awarded against them.

In the Opinion of the Court of Appeals of New York, it is most pertinently inquired:

"If the answer was not stricken out as a punishment for the contempt of which the defendants had been convicted, by what authority were the defendants deprived of their right to a trial and a determination of the issues involved?" (Rec., f. 205.)

(*b.*) The effect of removing the answers from the files, and of ignoring, in consequence, the proofs in the cause, was to terminate the litigation in favor of the plaintiffs.

And the effect of removing,—with such result—the answer from the files, *for the contempt* of the defendants, was to render a decree against them, *because of their contempt.*

This, in effect, appears upon the face of the decree *pro confesso:*

"*The answer of the defendant having been removed from the files, for their contempt* in refusing to obey the order of the court * * * it is now ordered, adjudged and decreed that the bill be taken *pro confesso* against them, &c." (Ex. 1, p. 354, Rec., p. 56.)

The decree *pro confesso*, as well as the final decree of April 17, 1878, turned upon the removal of the answer from the files, and were but consequences of such removal.

In the Courts of the United States, an order striking out an answer "is not a mere procedure in the cause. It is the ending of the cause, leaving the action undefended and with a right to immediate judgment."

Fuller et al. vs. Claflin et al., 93 U. S., 16.

It is a denial to the defendant, of the right to be heard in resistance of the claim made against.

Winsor vs. Mc Veigh, 93 U. S, 277–278.

The abstract right of McDonald and White to have *some* kind of judicial consideration of their answer, and of the proofs taken to support it, in advance of any final decree against them, can only be disputed by denying the end for which courts of justice are created.

To refuse them this right, on the ground of their contempt, was to *punish them for their contempt*, in a manner unauthorized by the laws of the United States.

Punishment does not consist merely in the infliction of corporal suffering or restraint, in the imposition of fines, or in the forfeiture of things.

It includes the divestiture, for offences, of any of those privileges or immunities which are recognized as belonging to the members of civil society.

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending the *causes* of deprivation, determining the fact."

Cummings vs. State of Missouri, 4. Wall., 320.

The cause of the removal from the files of the answer of McDonald and White, was, as is, in effect, recited in the decree *pro confesso*, "*their contempt* in refusing to obey the order of the court."

The deprivation and denial of the right of defense, consequent upon this removal, were, and were intended to be, *penalty* and *punishment* for such contempt.

Where an order denied to a defendant in contempt, the right *to appeal*, it was said by the highest court of New York, "the disability to proceed on his appeal, is a *punishment* inflicted affirmatively and directly by the order."

Brinkley vs. Brinkley, 47 N. Y., 50.

4. In the actual administration of justice, Courts can, in general, be made acquainted with disobedience of their orders, only through the returns of their officers, or the complaints of parties who are or may be injuriously affected by such disobedience. And it is commonly true, that it is the aim of the party who prosecutes a contempt founded upon such disobedience, to obtain some private remedy or benefit.

(*a.*) *Yet the interest and object which the individual who prosecutes the contempt, may have in its punishment, can never vary the limits assigned by law to the punishment itself.*

An individual may, indeed, have an interest, and find, also a remedy, in some punishment which is authorized by law, but no man can be admitted to have either interest or remedy in a punishment which is illegal.

(*b.*) It is not essential to the idea of punishment, that the punishment be inflicted solely for public benefit.

This may be illustrated in the case of *fines.*

"Fine, *finis*, signifieth a pecuniary punishment for an offence, *or contempt*, committed against the King, and regularly to it imprisonment appertaineth.

"And it is called *finis*, because it is an end of that offence. And in this case a man is *said facere finem de transgressione &c cum rege*, to make an end or fine with the King for such a transgression."

3 Tho: Co: Litt. 560 (2d Am. ed.)

The particular uses to which the king, or government, may devote the fine, when adjudged, does not alter the punitive character of the judgment itself, as to the person amerced.

Fines imposed by courts-martial, upon soldiers in service, are payable to the Soldiers' Home, at Washington, (R. S. U. S., sec. 4818,) and upon disabled soldiers, to the National Home for Disabled Volunteer Soldiers (sec. 4831).

Fines imposed, in this District, by the Police Board, upon members of the Police force, by way of discipline, were made part of the "policeman's fund." (R. S. U. S., D. C., secs. 361–362.)

Under Revised Statutes of the United States, District of Columbia, sections 1079–1080, the salaries of the judge, and other officers, of the Police Court, were payable out of the fines, penalties, forfeitures and costs, imposed and taxed by that Court.

So, under Revised Statutes of the United States, relating to this District, sections 313–316, moneys, in general, derived from fines, penalties and forfeitures imposed in this District, for violations therein of the laws of the United States, were to be applied to the support of the public schools.

One moiety of the fines and penalties collected under Revised Statutes of the United States, sections 4273–4476, and 4499, becomes payable to the *informers*.

And by Revised Statutes of the United States, sections 5349–5350, the fine imposed, after conviction, upon the seducer of any female passenger, on board of an American vessel, may be paid to herself, or her child.

The proceedings for these fines and penalties, do not cease to be criminal, as to the accused, because, from motives of public policy, the fines or penalties are directed in some cases, to be applied, in whole or in part, either to private benefit, or to particular objects of a public nature.

The punishment is the same, to the accused, whether the fine, or penalty, be wholly retained by the government, or relinquished, or shared, in favor of individuals.

Nor can he possess, in contemplation of law, any interest in the disposition to be made of the proceeds of the fine, or penalty, he has once satisfied and discharged.

Even when *fines*, imposed for contempts in disobeying orders and decrees, are payable, under statutes, either in whole or in part, to the person aggrieved by such disobedience, the fines, though they may constitute indemnity, as to the aggrieved, are still, as to the contemnors, not infrequently regarded as penalties imposed for offenses.

The People *vs.* Spalding, 10 Paige, 284–287;
Spalding *vs.* People, 7 Hill, 301–304;
Spalding *vs.* State of New York, 4 How., U. S., 26;
Bromley *vs.* The People, 7 Michigan, 478.

5. *Diversities in State laws and practice, as to contempts.*

It is familiar, indeed, to all, that in some of the State tribunals, contempts of judicial orders, or decrees, may be attended, either under express statute, or the established course of practice, with *civil* as well as *criminal* consequences, with loss or injury to private interests as well as with offense to the public; that such contempts have, hence, become there distinguished as *civil* or *criminal*, according to the consequences viewed as resulting from them; and that proceedings upon such contempts, are regarded as the pursuit of civil remedies, or the prosecution of public offenses, as the interests of individuals, or of the State, may be supposed to be chiefly involved.

But it is equally well known, that in other of the States, the prosecution of contempts, for disobedience to judicial orders, or decrees, is exclusively a criminal proceeding, and that no remedy for loss or injury to private interests can ever be directly enforced through such prosecutions.

6. Nor can there be cited, either any precedent in the District of Columbia, or any statute there in force, which authorizes the administration of civil remedies directly through proceedings upon contempt.

7. Course of Federal decision upon contempts.

APPENDIX C, (post, pp. 164–177.)

In that special field of controversy to which belong *Patent Cases*, and commencing with recent years, some of the Circuit Courts of the United States have directed the *fines* by them imposed upon defendants for contempts of provisional or interlocutory injunctions, to be paid by the defendants to the complainants, by way of compensation for the damages sustained by the latter, through breach of the injunctions, and have committed the defendants until payment.

The principle thus applied to the law of contempts, in this special class of cases, has been extended, in some instances, in theory, at least, to controversies of a different description.

The judicial animadversion thus made upon such contempts, has never been expanded, however, *beyond* fine and imprisonment.

And the imposition of these *fines*—though directed to be paid to the injured party—must still, it is believed, be regarded, upon the weight of Federal authority, as *the infliction of punishment.*

(APPENDIX C, post, pp. 164–177.)

V. The proceedings against McDonald and White are unlawful, when viewed merely as civil proceedings.

In the consideration of this proposition, the element of offense to the public disappears.

The rights of plaintiffs and of defendants, in civil controversies, constitute the subject of discussion.

To but little purpose, indeed, have Congress set bounds to *the punishments* which may be inflicted by the courts of the United States, for contempts of their orders and decrees, if the same contempts, when prosecuted through proceedings *described, or invented, as civil remedies*, may be visited with consequences which know no other curb than the will of the judge who pronounces them.

"*Judicial* power," says Mr. Chief Justice *Marshall*, "as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, *and can will nothing.* When they are said to exercise *a discretion*, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discovered, it is the duty of the court to follow it."

Osborne *vs.* Bank U. S., 9 Wheat., 366.
Hollon Parker, pet'r, 131 U. S., 221, 225.

The legislature of the Union has, indeed, prescribed the boundaries of judicial power, when exercised,—where restraint is most necessary,—in the *punishment* of contempts. But this particular limitation upon the authority of the judicial tribunals, implies their possession of no arbitrary nor infinite jurisdiction, when dealing with contempts, otherwise than by way of punishment thereof.

Under the process, or pretence, of administering *a civil remedy* for contempts of their orders or decrees, those tribunals may not subject the contemnor to unreasonable seizures or searches in his papers or effects; they may not forbid him to keep and bear arms; they cannot prohibit him the exercise of his religion; nor can they deny him any of the privileges and immunities secured to him by that Constitution which every judge is bound by oath to support, and which furnishes the law to courts as well as to individuals.

The fifth Amendment to the Constitution provides, in effect, that no person shall "be deprived of life, liberty or property *without due process of law.*"

And in the rights of life, liberty and property are included "all civil rights which men have."

Civil Rights Cases, 109 U. S., 13.

This provision, of course, is a limitation upon the powers and jurisdiction of the judiciary, as well as upon those of every other department of Government.

Murray's Lessee *et al. vs.* Hoboken Land and Imp. Co., 18 How., U. S., 277.

"In this country written constitutions were deemed essential to protect the rights and liberty of the people against the encroachments of power delegated to their governments, and the provisions of *Magna Carta* were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

Hurtado *vs.* California, 110 U. S., 531–532.

If the decree against McDonald and White was obtained through proceedings which violated this inhibition of the Constitution, the decree must be admitted to be a nullity.

Hans Nielsen, Petitioner, 131 U. S., 182, 183, 184.
See York *vs.* Texas, 137 *Id.*, 20–21.

"For eighty years from the 'parliament of Runnymede,' the history of England is the narrative of a struggle of the nation with the King, for the real enjoyment of the rights and liberties enunciated in the charter, or for the safeguards which experience showed to be necessary for the maintenance of those rights." (2 Stubbs Const. Hist., 1.)

And the sum of the advantages gained by the nation in this struggle (*Ib.*, 143,) was expressed in *Confirmatio cartarum*, (25 Edw. 1, cap. 5, Oct. 12, 1297,) directing, amongst other things, that *Magna Carta* be allowed as common law, *and declaring all judgments contrary to its provisions, to be null and void.* (*Ib.*, 141–142. 1 Bl. Com., 128.)

1. *"Due process of law" involves and implies the right to be heard.*

The application intended to be made of this proposition to the case of McDonald and White, is, as already explained, *that they were deprived of the judgment and consideration of the court upon their case as presented and closed, upon pleadings and proofs.* (Ante, pp. 54–55.)

(*a.*) The words "*due process of law*" are deemed to be equivalent to the law of the land.

Dent *vs.* West Virginia, 129 U. S., 123–124;
Missouri Pacific R'y Co. *vs.* Humes, 115 *Id.*, 519.

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

Ex parte Wall., 107 U. S., 289;
Hurtado *vs.* California, 110 *Id.*, 535;
Hagar *vs.* Reclamation Dist., 111 *Id.*, 708.

"For jurisdiction is the right to *hear* and determine; not to determine without hearing."

Windsor *vs.* McVeigh, 93 U. S., 283–284;
2 Inst., 54–55;
4 *Id.*, 38.

"No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, the claim against him to be unfounded."

Harris vs. Hardeman et al., 14 How. U. S., 341, citing *Starbuck vs. Murray*, 5 Wend., 156.
See also 7 Robinson's Practice, 22 *et seq.*

"It is contrary to the plainest principles of reason and justice that any one should be condemned as to person or property, without an opportunity to be heard."

Lasere vs. Rochereau, 17 Wallace, 438.
Taylor vs. Porter, 4 Hill, 140.

"*Videndum est igitur*," says Bracton, "*quod sit juditium. Et sciendum quod juditium est in qualibet actione trinus actus trium personarum, judicis vz actoris & rei, secundum quod largè accipi possunt hujus modi personæ, secundum quod duæ sint personæ ad minus, inter quas vertatur contentio, & tertia persona, ad minus, qui judicet, alioquin non erit juditium, cùm istæ per-*

sonæ sint partes principales in juditio, sine juditium consistere non potest."

Lib. 3, cap. 8, fol. 106 (Lond., 1569).

So, Fleta:

"*Actiones in judicio proponendæ sunt & probandæ; Est autem judicium trinus actus trium personarum ad minus. Actoris, Judicis & Rei, sine quibus legitimè consistere non possunt.*"

Lib. 1, cap. 17, § 1.

He is no judge who does not hear. He is no defendant who is not suffered to set forth his defense. Where there is neither *judex* nor *reus* there can be no *judicium.*

(*b.*) Due process of law, *upon proceedings for contempts,* requires that hearing and inquiry shall precede the deprivation of property.

In Iowa, in 1861, *Wright,* J., said: "If by '*due process of law,*' in the language of *Brown,* J., in *Taylor vs. Porter,* 4 *Hill,* 140, is meant no less than 'a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title of property,' *then the legislature cannot, under the guise of punishing a party for contempt, provide for condemning without hearing, for rendering judgment without inquiry, nor*

without such hearing and inquiry as he should have by due process of law."

Ex parte Grace, 12 Iowa, 208, 214;
See Cason *vs.* Cason, 15 Georgia, 403, 407.

If the legislature, under the form of prescribing punishments for contempts, can confer no authority upon courts of justice to deprive men of their property, without such hearing and inquiry as are essential to the idea of due process of law, the judicial tribunals under the ceremony of *administering civil remedies for contempts* cannot, of their own motion, deprive men of their property, without like hearing and inquiry.

(*c.*) McDonald and White had been regularly cited to appear and answer the bill of the complainants.

This they had done.

And to their answer had been filed *a general replication.*

Upon the issues thus joined, and upon the voluminous evidence relating to those issues, the cause stood "*to be heard,*" upon its merits.

For their subsequent disobedience of an interlocutory order, their answer was stricken from the files, the evidence wholly ignored, and a final decree entered against them, without hearing, or pretense of hearing, the merits of the controversy.

The plaintiffs were, in effect, the only participants in the creation of that decree.

This, in effect, is the sum of the Washington record.

"What then does it show, except that the proper forms of the administration of justice were disregarded, the functions of the judge were abnegated, there was no hearing or decision by the Court and the counsel for the" plaintiffs "was allowed to prepare and enter such a decree as he chose?"

Ensminger *vs.* Powers, 108 U. S., 301.

But, in the Federal tribunals, a decree *pro confesso*, even where it may be properly granted, "*is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it*," but "is made, (or should be made,) *by the Court* according to what *is proper to be decreed* upon the statements of the bill, assumed to be true."

Thompson vs. Wooster, 114 U. S., 113.
See, also, 1 *Dan. Ch. Pract.*, 525–526, 531, and Note 8 (5th Am. ed.).

(*d.*) In a District Court of the United States, in Virginia, upon proceedings for the confiscation of property, the appearance, claim and answer of the owner were stricken from the record, and a peremptory decree entered for con-

demnation and sale of the property, because, as was asserted, the respondent was *in rebellion* at the time of answer filed.

If the assertion were true, the contempt of national authority was as flagrant, *at least*, as any imputed by our local court to McDonald and White.

It was said by this Court:

"The order, in effect, denied the respondent a hearing. It was alleged that he was in the position of an alien enemy and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and our civilization. We cannot hesitate or doubt upon the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

McVeigh *vs.* U. S., 11 Wall., 267.
See Ensminger *vs.* Powers, 108 U. S., 301.
Sabariego *vs.* Maverick, 124 *Id.*, 292–293.

The case of *McVeigh vs. U. S., supra*, had reached *this* Court, *on error* to the Circuit Court, which had affirmed the decree of the District Court.

But six years after, in an action of *ejectment*, brought by the former owner against the purchaser, to recover a parcel of land, not involved, indeed, in the previous suit, but condemned and sold, under proceedings similar to those conducted in that suit, *this* Court adjudged the nullity of the decree, *in such collateral action.*

This Court, after citing what is quoted above from *McVeigh vs. U. S.*, said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, *and is not entitled to respect in any other tribunal.*"

Windsor *vs.* McVeigh, 93 U. S., 277. See *Id.*, pp. 279–280.

The Court added:

"It is difficult to speak of a decree thus rendered, with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

"The law is and always has been, that whenever notice or citation is required, the party cited has a right to appear and be heard; and when the latter is denied, the former is ineffectual. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him."

Id., 278.

"*It was not within the power of the jurisdiction of the District Court to proceed with the case,* so as to affect the rights of the owner, *after his appearance had been stricken out, and the*

benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing."

Id., pp. 283–284.
Sturges vs. Hancock, 4 App. Cas. D. C., 289, 292–293.

If, notwithstanding their contempt, McDonald and White might continue to be assailed as to their rights, or property, they might also, notwithstanding their contempt, continue to defend against such assault.

And the decree which deprived them of this right,—so long as the "supreme *law*" and the "Supreme *Court*," of the land, retain any claim to regard, is not itself entitled to respect in any tribunal on earth.

The removal of their answer from the files, (and, especially, since their evidence was ignored,) denied to McDonald and White the right to be heard, by depriving them of all grounds for contesting the suit.

The denial of this right rendered ineffectual their appearance to the suit, and amounted, in consequence, to a revocation of the process by which they were originally required to appear and to answer.

2. *Due process of law imports, under Federal decision, compliance with established methods of precedure.*

But when applied to judicial proceedings, the words "*due process of law*" mean "a course of legal proceedings *according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private right.*"

Pennoyer *vs.* Neff, 95 U. S., 733.
Scott *vs.* McNeal, 154 *Id.*, 34, 46.

It denotes, as we have seen, that judgment, or decree, must pursue the issues raised in the cause wherein judgment, or decree, shall be rendered.

Reynolds vs. Stockton, 140 U. S., 254, 264–265, 268–269.

And it requires that, in advance of his trial, a person accused of an infamous crime, shall plead, or be ordered to plead, or, in a proper case, have *not guilty* filed in his behalf.

Crain vs. U. S., 162 U. S., 625, 645.

It is a process "which, following the forms of law, *is appropriate to the case, and just to the parties to be affected by it.* It must be pursued *in the ordinary mode prescribed by law;* it must be adapted to the end to be attained."

Hagar *vs.* Reclamation District, 111 U. S., 708.

The proceeding which constitutes due process of law, is a proceeding "suitable and proper to the case, *and sanctioned by the established customs and usages of the courts.*"

Ex parte Wall., 107 U. S., 289.

It should be "*according to the settled course of judicial proceedings.*"

Walker *vs.* Sauvinet, 92 U. S., 93.

"So *a departure from established modes of procedure will often render a judgment void;* thus the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose.

"The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is that the courts are not authorized to exert their power in that way."

Windsor *vs.* McVeigh, 93 U. S., 283.

The inventor of the "*Keely Motor,*" being a defendant in equity, but having been required, by a Court of Common Pleas, upon the motion of the plaintiff, to exhibit and operate the machine, *before issue joined,* was attached and committed for contempt, in disobeying such requirement.

On *Habeas Corpus,* he was released by the highest Court of the State.

It was there said:

"If the court below had jurisdiction of the parties and the subject-matter, and the order in question *was lawfully made,* it possesses the power to enforce it by attachment. It is almost needless to say that the converse of this proposition is equally true."

Commonwealth, &c. *vs.* Perkins; 124 Pa. St., 48 (an. 1889).

Conceding, that, at a proper stage of the case, the defendant might have been compelled to exhibit his invention, *Paxson*, C. J., added:

"But to make an order not only to exhibit, but to wring from him his defense, *in advance of an issue joined*, was an excessive and improvident exercise of chancery powers."

Id., 57.

In the case of *Keely*, the Common Pleas transcended the powers of a court of equity, by the premature order for a disobedience of which the defendant was punished as for a contempt.

But in the case of *McDonald* and *White*, our local court transcended the powers which belonged to that court, by depriving those defendants of their property, without reference to their answer, or their evidence, on the ground of their contempt.

The invalidity of the order entered against *Keely*, arose from the *discovery* of his defense, commanded in advance of issue joined.

The illegality of the proceedings against McDonald and White, flows from the denial to those defendants of *all right* of defense, even after the completion of the pleadings and the close of the testimony.

That considerable difficulty will often attend the inquiry, whether a given judgment, or decree, be merely erroneous, or absolutely void, is not to be denied.

But where either the judgment, (or decree,) or the course of proceedings in which it results, invades rights and privileges so fundamental in their nature as to be viewed as be-

longing to every individual, in a state of enlightened society, or rights and privileges expressly secured to the citizen, by the Constitution of the United States, or over which the court pronouncing the judgment, or decree, or conducting the proceedings in which it originates, is prohibited, or not empowered, by law, to exercise the jurisdiction necessarily assumed in the rendition of the judgment, or decree, in all such instances, the views expressed by this Court in McVeigh *vs.* U. S., 11 Wall., 259; Windsor *vs.* McVeigh, 93 U. S., 274; Boyd *vs.* U. S., 116 *Id.*, 616; Hans Neilson, Petr., 131 U. S., 182, and other like cases, must ever exert a salutary and preponderating influence.

And the observations of this Court, upon the punishment of offenses indictable under the general criminal code, are equally applicable, in spirit, to the punishment of contempts, without indictment:

"The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which, in most cases, would be unavailing to give relief."

In re Bonner, 151 U. S., 259.

3. After a cause has been regularly closed, on both sides, upon pleadings and proofs, and set down for hearing, the defendant, on account of his subsequent contempt, cannot under the custom, usages and settled course of procedure prevailing in the State tribunals, in general, be deprived of the judgment and consideration of the Court, upon the case

so closed and set down, by striking out his answer, ignoring his evidence and rendering, as upon default, a final decree against him.

(a.) *It may be asserted, with some confidence, that in the States of the Union, in general, pecuniary indemnities, fines and imprisonments, are supposed to exhaust the direct remedies and penalties for contempts of judicial orders, or decrees, whether such contempts be prosecuted as civil remedies, or punished as criminal offenses.*

Arkansas:

Eads *et al. vs.* Brazelton, 22 Ark., 499, 516.

California:

In re Fil Ki, 80 Cal., 201, 204 (an. 1889).

Delaware:

Green *et al. vs.* Hill, 2 Del. Ch., 92.

Florida:

State *vs.* Johnson, 13 Fla., 33, 52.

Illinois:

Tolman *vs.* Jones, 114 Ill., 147, 153.

Iowa:

Baily *vs.* Baily, 69 Iowa, 77, 78–79 (an. 1886).

Kansas:

The State *vs.* Dent, 29 Kan., 416, 418 (an. 1883).

Maine:

Russell *vs.* Russell, 69 Maine, 339.

Michigan:

Haines *vs.* Haines, 35 Mich., 146.
Scott *vs.* Chambers, 62 *Id.*, 532 (an. 1886).
Potts *vs.* Potts, 68 *Id.*, 492 (an. 1888).
Langdon *vs.* Wayne County, 76 *Id.*, 372–373 (an. 1889).

Minnesota:

In re Fanning, 40 Minn., 4 (an. 1889).

Nevada:

Phillips *vs.* Welch, 11 Nev., 187.

New Jersey:

Freeze *vs.* Swayze, 26 N. J. (11 C. E. Green), 439 (an. 1875).

North Carolina:

Ex parte Rhodes, 65 Nor. Car., 519 (an. 1871).
Ex parte Walker, 82 *Id.*, 95 (an. 1880).
Baker *vs.* Cordon, 86 *Id.*, 116 (an. 1882).
In re Patterson, 99 *Id.*, 407, 417 (an. 1888).

Ohio:

Lowe *vs.* The State, 9 Ohio St., 339.
Schultz *vs.* The State, 32 *Id.*, 276, 281–282 (an. 1877).
Diehl *vs.* Triester, 37 *Id.*, 473, 474 (an. 1882).

Oregon:

Under the Code, decrees and orders, when not for the payment of money, may be enforced by punishment inflicted for contempt.

Newhouse *vs.* Newhouse, 14 Oreg., 292 (an. 1880).

Pennsylvania:

Tome's Appeal, 50 Pa. St., 278.
Commonwealth *vs.* Reed, 59 *Id.*, 429.
Commonwealth, &c., *vs.* Perkins, 124 *Id.*, 36 (an. 1889).

Rhode Island:

Hazard *vs.* Durant, 11 R. I., 195 (an. 1877). S. C., 12 *Id.*, 99 (an. 1878).

South Carolina:

Under Code, when decrees or orders are not for payment of money.

Earle *vs.* Stokes, 5 So. Car. Eq., 336, 340 (an. 1874).
Golson *vs.* Holman, 28 *Id.*, 53, 57–58 (an. 1887).

Tennessee:

Robbins *vs.* Frazier, 5 Heisk., 100 (an. 1871).
Blair *vs.* Neilson *et al.*, 8 Baxter, 1 (an. 1874).
See Howell *vs.* The State, 10 Lea, 547.

Texas:

Edrington *vs.* Pridham, 65 Tex., 612, 617 (an. 1880).

Vermont:

Stinson et al. vs. Putnam et al., 41 Vert., 238.

Virginia:

B. & O. R. R. Co. *vs.* The City of Wheeling, 13 Gratt., 40, 57 (an. 1855).
Wells *vs.* The Commonwealth, 21 *Id.*, 500, 504–505 (an. 1871).

West Virginia:

State *vs.* Harper's Ferry Bridge Co., 16 W. Va., 864 (an. 1879).
Ruhl *vs.* Ruhl, 24 *Id.*, 279, 283 (an. 1884).
Alderson *vs.* Commissioners, 32 *Id.*, 640, 648 (an. 1889).
State *vs.* McClaugherty, 33 *Id.*, 250, 256.

Wisconsin:

Ex parte Day, &c., 34 Wisc., 638.
Haight *vs.* Lucia *et al.*, 36 Wisc., 355 (an. 1874).
In re Murphy, 39 *Id.*, 286 (an. 1876).
In re Ida Louisa Pierce, 44 *Id.*, 411 (an. 1876).
Cleveland *vs.* Burnham, 60 Wisc., 16–17 (an. 1884).
Wright *vs.* Wright, 74 Wisc., 74 *Id.*, 439 (an. 1889).

Of the above cases, three there are, perhaps, which may merit some particular consideration, in order that they be correctly understood.

Stinson et al. vs. Putnam et al., 41 Vert., 238:

The complainants having obtained *decrees of foreclosure* against the defendant, (*Id.*, 238,) and an injunction restraining his removal of certain *machinery* from the mortgaged premises (*Id.*, 239,) and such decrees having become absolute and thereby rendered the mortgaged premises the property of the complainants, and the defendant having disobeyed the injunction, the complainants filed in the cause their certain petition, wherein they prayed, amongst other things, that the defendant might be *committed*, until payment to them of the damages they had sustained by his breach of the injunction, and until payment, also, of such fine as might be imposed upon him by the court. (*Id.*, 240.)

The proceeding thus commenced *by petition*, being resisted by the defendant, evidence was produced, in its progress, to enlighten the judgment of the court.

"This proceeding for contempt," the court said, "is instituted not only to punish the guilty party, but, also, and, perhaps, chiefly, to cause restitution to the party injured. The complainants in this case aver, that to be made whole, they are entitled to the value of the machinery removed, and to compensation for the other injury to the property, which has come into their hands under the decrees of foreclosure. The defendant denies all injury other than the removal of the machinery, and, as to that, that the machinery did not stand upon the mortgaged premises." (*Id.*, 247.)

The relief sought, in the petition, could be administered, it was held, *as well under that form of complaint as through the ordinary course of supplemental proceedings.* (*Id.*, 248.)

It was established *by the evidence furnished in support of the petition*, that the losses of the petitioners amounted, inclusive of certain interest, to $1,170. The court thereupon, adjudging the defendant to be in contempt, directed payment by him of that sum to the petitioners, imposed upon him a fine of $50, to be paid into the State treasury, and directed his commitment until both payments should be made. (*Id.*, 249.)

That the court here distinguished the payment directed to be made to the petitioners, by way of restitution or indemnity, from the fine imposed upon the defendant for his offense against the State, is at once apparent.

But to suppose that what was ordered or decided against the defendant, by the court in Vermont, *after final decrees in foreclosure*, bears any analogy or resemblance to what was adjudged and decreed, at Washington, against McDonald and White, *after interlocutory order*, is to ignore the distinction that exists between dissimilars.

The case from Vermont receives illustration from—

Ex parte Day, &c., 34 *Wisc.*, 638 (an. 1874)—

Where the defendant who, from lands in the possession of a Receiver, had cut timber and converted it into *shingles* and sold the same beyond the jurisdiction of the court, was adjudged guilty of contempt, and decreed, *upon evidence furnished in the progress of the proceedings* for contempt, to pay the Receiver for 93,000 shingles, at the rate of $3.00 per thousand, a reference to the Master being directed, to ascertain what allowance should be made to the defendant for the conversion of the timber into shingles.

But, in this case, the Court expressly reserved for consideration, upon the merits, the question to whom the money, when paid to the Receiver, would belong.

Foster vs. Redfield et al., 50 *Vert.*, 285, 292 (an. 1877).

A defendant husband, having disobeyed an order of the County Court, to pay provisional alimony, and having fled the jurisdiction to escape such payment, nevertheless, through counsel, applied to the Appellate Court for *mandamus*, to compel the County Court to enter judgment in his favor, upon the merits, agreeably to a decision previously made by that court, but afterwards rescinded upon grounds in nowise connected with his disobedience and contempt.

The writ was refused.

"This court, as now constituted," it was said, "may not be counted upon for help in enforcing action of the County Court in behalf of a party who has absconded from the realm for the purpose of defying the jurisdiction and the orders of the judicial authorities of the State, in the very matters in reference to which he is asking the action of this court in his own favor. If he makes himself an alien, in enmity to the jurisdiction and judicial authority of the State, in reference to a matter whereof that authority had jurisdiction, as well as of himself, the character of an alien enemy will adhere to him when he asks of this court help towards rendering his enmity successful." (*Id.*, 292.)

The principle here decided was, that an absconding contemnor was *not entitled to the assistance of an appellate tribunal, in rendering his flight and disobedience successful and triumphant.*

The action of the Court below—the nature of the application addressed to it—as well as the tenor of its opinion,—

so far from *implying*,—do seem most strongly *to negative*,—the recognition of any power in the County Court, to strike from the files the *answer*, and, in effect, the *proofs*, also, of the defendant, and to render a peremptory and final judgment against him, on the merits, because of his contempt and removal from the State.

(*b.*) Such indeed, is the natural aversion of the judicial mind from rendering judgment without hearing or inquiry, that instances are not wanting, in which the Courts, rather than become possible instruments of injustice, have conceded to a defendant, while in contempt, the privilege of interposing or completing a defense, from which, as strict matter of right, he was confessedly debarred and excluded, by reason of his offense.

A decree of foreclosure being entered against the defendant, for want of defense, after service of process, and the executors of the plaintiff, upon the decease of their testator, having sought to revive the decree, the defendant, in resistance of the revivor, offered to show by *plea*, (which was filed in aid of the offer,) that the debt secured by the mortgage was tainted with *usury*.

Though it was objected by the executors, not only that the defendant *was in contempt*, for want of obedience to the original process, but that the proposed plea *went behind the decree*,—the plea was, nevertheless, received.

The court, observing that the contempt was to the original process and not to the subsequent decree, and that it

was proper the plea should accompany the offer of the defendant, in order that the court might judge of the value of the plea, said:

"And if it be such a one as the court should have received before the decree, and when the defendant was in contempt to the original process, it should be received now, because it goes to show that the plaintiff is not entitled to the aid of the court under any circumstances, if the contract be *usurious.*"

Lane *vs.* Ellzey, 4 Hen. & Munf., 504–505 (an. 1810).

Where a defendant, attached for his contempt in disobeying a *final* decree, moved to reopen the same, he was, nevertheless, in New Jersey, heard upon his motion.

"Although," said the Court, "the general rule is, 'that a contemnor who is in contempt, is never to be heard by motion or otherwise, until he has cleared his contempt and paid his costs,' (Gill. For. Rom., 101,) yet, under such circumstances as are here presented, the court will hear the defendant, though in contempt, on such a motion as this, *although it is addressed to the favor of the court,* for he stands, as it were, *in vinculis.*"

Freeze *vs.* Swayze, 26 New J. Eq. (11 C. E. Green), 439 (an. 1875).

Durant, a defendant in equity, being restrained, on the filing of the bill, from receiving certain *dividends,* and having

disobeyed the injunction, was adjudged guilty of contempt and committed by a single justice of the Court.

Subsequently, and for the want of an answer, and not on the ground of his contempt, there was a decree *pro confesso* against him.

In this situation of affairs, the defendant moved to be permitted to purge his contempt, and also to defend the suit; filing, in support of his motion, an affidavit, containing the matter of his proposed answer, wherein was denied the claim asserted in the bill.

This motion being overruled, he appealed to the full bench.

The reviewing court overruled the objection taken to the appeal, that the applicant was in contempt, but concurred in the opinion below, that the matter alleged in purgation of the contempt was insufficient for that end.

Neither would that court grant leave to the appellant to file an answer, a request for which, it was said, he had cited no precedent.

But the court added:

"It does not follow, however, that we are to abandon the suit to the plaintiffs. A decree *pro confesso* is not to be entered unless the plaintiffs, upon the face of their bill are entitled to equitable relief. And in the peculiar circumstances of this case, where the principal defendant denies the allegations of the bill, and asks to be permitted to defend them, and is only refused the privilege of defense, because he is in contempt, the question arises whether we ought in any event, to enter a decree against him, without first referring the case to a master to ascertain the truth of

the allegations, so that our minds and consciences may be satisfied upon the point. This is a question, however, upon which we have not heard the views of counsel, and upon which we do not desire to express an opinion until we have heard them."

Hazard *vs.* Durant, 11 Rhode Island, 195, 209 (an. 1877).

This question was ably argued, in 1878.

Hazard *vs.* Durant, 12 Rhode Island, 99.

The court, after adverting to the circumstance, that the defendant was charged, in the bill, "with enormous embezzlements and misappropriations," said:

"The defendant intreats for leave to answer, denying them. Shall we then proceed as if they were true, because the defendant, being in contempt, and unable to relieve himself, cannot make his denial effectual by answer or defense? The question is novel; but we think it admits of but one solution. The court must be careful not to become an instrument of injustice, even against a person who has forfeited all claims upon its favor. We decide, therefore, that the cause must go to a master to inquire into the truth of the inculpating allegations of the bill, and if he finds them true to any extent, to take the account accordingly, making, for the sake of dispatch, one report of the entire matter. We also decide that in making the inquiry, the master shall not be confined to testimony furnished by the complainants, but shall notify *Durant*, so that he may be present, if he sees fit, to aid the inquiry, and to testify himself, and furnish the testimony of others."

Id., 101.

A special and particular decree was entered accordingly.

Id., 101–102.

4. There is no *adjudication* by any Federal Court which sustains the decrees pronounced against McDonald and White.

The case of *Wartman vs. Wartman*, Taney Dec., 362, explained in APPENDIX D, (post, pp. 178–181), lends no countenance to those decrees.

The decrees can be sustained, if at all, only upon the established principles of equity jurisprudence and practice prevailing in the national tribunals.

5. *In the absence of special statute, or rule, the jurisdiction and practice, in equity, of the national tribunals, in general, including the Supreme Court of the District of Columbia, are in analogy to the jurisdiction and practice which were known to the High Court of Chancery in England.*

(*a.*) The judicial power of the United States is extended by the Constitution to certain enumerated "cases in *law* and *equity*."

2 Story Const., § 1645.

(*b.*) By Act of Congress of May 8, 1792, section 2, (1 Stat., 275), retained as to the Circuit and District Courts, in Revised Statutes of the United States, section 913, the forms and modes of proceeding in suits in equity, in the Courts of the United States, were required to be according to the principles, usages and rules of equity, as contradistinguished from courts of common law, but subject either to any alterations or additions that might be made by those courts, or to such regulations as *this* Court should, by rule, prescribe.

Phillips' U. S. Sup. Ct. Pract., 324 (5th ed.);
Vattier vs. Hinde, 7 Peters, 274;
Clark *vs.* Reyburn, 8 Wall., 323.

The remedies in equity, in the Courts of the United States, in general, were left to be determined according to the principles of equity "as distinguished and defined *in the country from which we derive our knowledge of those principles.*"

Robinson *vs.* Campbell, 3 Wheat., 223;
Boyle *vs.* Zacharie *et al.*, 6 Peters, 658;
Livingston *vs.* Story, 9 *Id.*, 655;
Gaines *et al. vs.* Relf *et al.*, 15 *Id.*, 15;
Irvine *vs.* Marshall *et al.*, 20 How., U. S., 565;
Fenn *vs.* Holme, 21 *Id.*, 484;
Barber *vs.* Barber, 21 *Id.*, 604;
Thompson *vs.* Railway Companies, 6 Wall., 137;
Payne *vs.* Hook, 7 *Id.*, 430;
Clark *vs.* Reyburn, 8 *Id.*, 323;
Van Norden *vs.* Morton, 99 U. S., 380;
Root *vs.* Railway Co., 105 *Id.*, 207;
Kirby *vs.* Lake Shore R. R., 120 *Id.*, 138.

(c.) Of the Rules of Equity Practice prescribed for the Circuit Courts by this Court, and of the adoption, by such Rules, in cases where they do not apply, of the practice of the recent High Court of Chancery of England.

At August Term, 1792* this Court, in answer to an inquiry moved by the Attorney-General, had announced that the practice of the courts of *King's Bench* and *Chancery* in *England* was considered as affording outlines for the practice of this Court, which would from time to time, make such alterations in that practice as circumstances might render necessary.

2 Dall., 411–414.

At February Term, 1822, this Court, under the authority conferred by the Act of Congress of May 8, 1792, section 2, (7 Wheat., V.) had established "Rules of Practice for the Courts of Equity of the United States," the thirty-third of such Rules being as follows:

"In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England." (7 Wheat., XIII.)

---

* August Term, 1791, according to 1 Pet., VII, 1 How., U. S., 24; 5 *Id.*, 475.

No rule of practice had been established by this Court, *in respect to contempts.*

Worcester *et al. vs.* Truman *et al.*, 1 McLean, 483–484 (an. 1839).

By Act of Congress of August 23, 1842, section 6, (5 Stat., 518,) this Court was again empowered to prescribe and regulate, from time to time, the forms and modes of proceedings in equity, in the Courts of the United States.

In 1842, this Court, under such last enactment, prescribed and promulgated anew, certain Rules for the practice of the Circuit Courts, in cases in equity; and many of these Rules were closely copied from the *General Orders* made by *Lords Cottenham* and *Langdale*, in the preceding year.

Waring *et al. vs.* Clarke, 5 How., U. S., 474-475;
Thompson *vs.* Wooster, 114 U. S., 112, note.
3 Greenl. Ev. §§ 256, 319, and note 1;
1 Br. Dig. 257, note *b*.
Rec., pp. 67–70.

These rules applied, of course, to the Circuit Court *for the District of Columbia*, of which the Supreme Court of that District became, in 1863, the successor.

The ninetieth of the Rules thus prescribed for the Circuits, was as follows:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the high court of chancery of England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." (Rec., p. 70.)

17 Peters, Appx.
State of Penna. *vs.* Wheeling, &c., Bridge Co., 13 How., U. S., 563.
Clark *vs.* Reyburn, 8 Wall., 323.
Thompson *vs.* Wooster, 114 U. S., 112, note.

This rule referred, and continues to refer, to the practice of the high court of Chancery in England, as that practice prevailed in 1842, when the rule was adopted.

Thompson *vs.* Wooster, 114 U. S., 112, note.

(*d.*) *Of the equity jurisdiction, practice and Rules of the Supreme Court of the District of Columbia, and of the adoption by such Rules, in cases where they do not apply, of the practice of the recent High Court of Chancery of England.*

The distinction between *law* and *equity*, is maintained in the District of Columbia, as fully as upon the Circuits.

Willard *vs.* Wood, 135 U. S., 314.

The Supreme Court of the District of Columbia is vested, under section 760, Revised Statutes of the United States, relating to that District, with the jurisdiction, in equity, possessed by the Circuit Courts.

It is also vested with such jurisdiction, *in equity*, as may have been inherited by that District, (subject to the qualifications already explained,) *under the statutes of Maryland* retained in force in the District.

But as no statute of Maryland lends any support to the decree pronounced against McDonald and White, the jurisdiction of the Supreme Court of the District of Columbia to render that decree, must depend upon the jurisdiction, in equity, vested in that court, as the possessor of Circuit Court powers.

But, in the absence of statute, the same principles and rules of decision were ever applied by this Court to cases in equity appealed from the Supreme Court of the District of Columbia, as were applied, in like cases, appealed from the Circuits.

And the Supreme Court of the District professes to be governed, in cases in equity, in the absence of statute, by the general principles of remedial justice drawn from the decisions of the English Chancery and of the Supreme Court of the United States.

Under the power to make rules of practice, conferred upon the Supreme Court of the District of Columbia, by section 770 of the United States Revised Statutes relating to that District, there had been established by that court, before the year 1875, and had remained in force, until after the year 1879, certain Rules of equity practice, very nearly resembling those which had been promulgated by this Court, as already mentioned, in 1842. (Rec., pp. 64–67, 90–91.)

The eighty-ninth of the Rules thus established by our local court, was as follows:

"In all cases where these rules do not apply, the practice of the court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the District, not as positive rules, but as furnishing just analogies to regulate the practice." (Rec., p. 91.)

This Rule is nearly, in *totidem verbis*, the ninetieth Rule prescribed by this Court for the Circuits.

(*e.*) The Rules of practice in equity, prescribed by this Court and by the Supreme Court of the District of Columbia,

do not embrace the subject of *contempts*, except as incidentally implied from the provisions concerning *attachment*, *sequestration* and *the writ of assistance*, which are contained in Rules 7, 8 and 9 of the former court, and in Rules 84, 85 and 86, of the latter. (Rec., pp. 70, 91; 67, 92.)

It may be said, then, that the rules, principles and modes of procedure which have been established in our national system of equity jurisprudence, are, in general, such as agree with, or are in analogy to, the rules, principles and modes of procedure which were established in the English Chancery.

This, in 1839, was adjudged as to *proceedings for contempts.*

Worcester *et al. vs.* Truman *et al.*, 1 McLean, 483–484.

6. *In the High Court of Chancery in England, a defendant, though in contempt, might resist, as of right, any proceeding taken against him by his adversary.*

(*a.*) If this proposition be correct, it must be admitted to establish, *a multo fortiori*, that in the English chancery, a

contempt committed by the defendant, after the cause is set for hearing, does not deprive him of the right *of so far passively resisting the entry of final decree against him, as to have the judgment and consideration of that Court, upon his case as actually presented and closed upon pleadings and proofs.*

(*b.*) Can any precedent be collected from modern English chancery, which denies to a defendant, when in contempt, the right of resisting a proceeding *taken against him by his adversary?*

Since the days of Lords *Cottenham* and *Langdale*, whose General Orders were deemed worthy of adoption as rules of practice for the Federal tribunals, (ante, p. 123,) has a British chancellor suffered any proceeding to be commenced, or to be continued, against a person in contempt, without affording such person an opportunity to be heard in opposition to the proceeding, and to exert against it the common and usual methods of defense?

The language of *magna carta* is not addressed to the *common law* tribunals merely.

It speaks to the judicial *system* of England, however distributed or divided, for the administration of right and justice.

Where one in contempt presumes to demand *favor* or *indulgence* from the Court he has offended, he could not be heard in the English chancery—he ought not to be heard anywhere—without first purging his contempt.

But, in the English chancery, the right of an individual to be heard, and to employ the ordinary means of defense, against any proceeding *taken against him*, was neither forfeited nor affected by any, his previous act of contempt.

The right to be heard and to resist, was inseparable from the liability to be bound by the proceeding.

(c.) "By the seventy-eighth of Lord Bacon's Ordinances of January, 1618, they that are in contempt are not to be heard, neither in that suit, nor any other, except the Court of special grace suspend the contempt."

1 P. C. Coop., 208–209.

At the date of the adoption of this ordinance, (15 Jac. I,) as well as long before and long afterwards, the non-performance of orders and decrees was punishable, *in chancery*, as if at common law, *by fine and imprisonment.*

Cary Rep., 77–78, 147 (ed. 1872);
Choice Cas. in Ch., 127–128 (Lond. ed., 1870);
Monro's Acta Cancillariæ, 640;
Tothill, 32, 33, 34, 157 (Lond., an. 1642).

It is, indeed, shown by the learned researches of Mr. *Spence*, that such was the punishment, *in chancery*, from the time of Henry VI, (an. 1422,) to the accession of Charles I, (an. 1625.)

1 Spence Eq. Jur., 391–392.

"Originally, in the absence of statutes providing otherwise," it was said, in 1887, "decrees of courts of equity, of whatever kind or nature, operated strictly and exclusively *in personam*. The only remedy for their enforcement was by what is termed process of contempt, under which the party failing to obey them was arrested and imprisoned until he yielded obedience, or purged the contempt by showing that disobedience was not willful, but the result of inability not produced by his own default or contumacy. The writ of assistance to deliver possession, and even the sequestration to compel the performance of a decree, are comparatively of recent origin."

Clements *vs.* Tillman *et al.*, 79 Georgia, 451, 453, 454.

And attachment and committal are still, in England the remedy for disobedience of the orders of her courts.

Regina *vs.* County Judge, &c., 36 Weekly Rep., 475, 476 (an. 1888).

(*d.*) The true construction of the order of *Lord Bacon*, has been fixed by numerous decisions.

1. In 1834, *the plaintiff* being in contempt, with attachment issued against him, for disobedience to an order in the cause, *the defendant*, on the ground of such contempt, objected to the hearing of the cause, though then standing to be heard.

The objection was overruled.

"Suppose," said Sir L. *Shadwell*, V. C., "the Defendant had moved to dismiss the Bill, the Plaintiff, notwithstanding he was in contempt, might have come forward and assigned reason why his Bill should not be dismissed.

"Lord Bacon's Order, as administered in Practice, is confined to Cases where parties who are in contempt come forward, voluntarily, and ask Indulgencies.

"But the Rules of the Court make it imperative on the Plaintiff to bring his cause to a Hearing, at a certain time; and, therefore, the cause must proceed."

Ricketts *vs.* Mornington, 7 Sim., 200.

2. In 1836, Lord *Cottenham*, in adverting to the distinction that existed between a motion made by a person in contempt to relieve himself against orders passed *before* the contempt was committed, and a motion thus made for relief against orders passed *thereafter*, said that "he would never extend the rule to a case where the order sought to be set aside on the ground of irregularity, was made *subsequent* to the contempt. That such an extension of the rule *would place the party in contempt too much at the mercy of his adversary.*"

Parker *vs.* Dawson, 1 C. P. Coop., 207.

3. The defendant being in contempt, and also attached—for want of answer,—the cause, upon the bill being taken *pro confesso*, was referred to the master, to state accounts.

The defendant, *not having been served with warrants to attend the master*, upon the coming in of the report of the master, and its confirmation, in the first instance, and without an order *nisi*, by the Vice-Chancellor, petitioned the last to set aside the report and to order a new reference, which petition the Vice-Chancellor overruled.

Held, in January, 1838, on appeal, that the defendant, notwithstanding his contempt, should have been served with warrants to attend the master.

"What I wanted," said Lord *Cottenham*, who had directed an inquiry into precedents—"was to find whether the plaintiff was regular in that proceeding, because if the plaintiff ought to have *served warrants on the defendant*, and if he ought to have served him with the order *nisi*, it would be a most unjust extension of the rule against parties in contempt, to take away a man's estate, without giving him an opportunity of coming in and protecting himself.

"The Court will not hear a party in contempt coming himself into Court, to take any advantage of proceedings in the cause, but such a party is entitled to appear, notwithstanding, and resist any proceedings taken against him."

King *vs.* Bryant, 3 My. & Cr., 191, 195.

4. The plaintiff, while himself in custody, under an attachment for contempt, obtained against him by the defendant, for non-payment of costs, secured in turn, an attachment against the defendant, for want of answer, which latter attachment the defendant moved to discharge, on the

ground that the plaintiff, when obtaining the order therefor, was himself in contempt.

This motion was overruled by the Vice-Chancellor.

Wilson *vs.* Bates, 9 Sim., 54.

His decision was sustained, on appeal, by Lord *Cottenham*, in **1838,** upon a full review of the authorities.

Commenting upon the cases for which the seventy-eighth ordinance of Lord Bacon had omitted to provide, the Chancellor said:

"It is also *well settled*, that if a party in contempt is brought into court by any proceedings taken against him, he has a right to be heard in his defense, and in opposition to those proceedings; another case which is inconsistent with Lord *Bacon's* ordinance, if construed strictly."

Wilson *vs.* Bates, 3 My. & Cr., 201.
See also, in 1838, Parry *vs.* Perryman, 1 C. P. Coop., 207–208.
And, in 1886, Chatterton *vs.* Thomas, 36 Law Journ., Ch. N. S., 592, per *Wood*, V. C.

5. The plaintiff having obtained an injunction, upon the condition of trying an action at law, and the defendant

having subsequently moved to dissolve the injunction, on the ground of the laches of the plaintiff in proceeding with the trial, *the Lord Chancellor* had overruled the motion, while intimating that the plaintiff would be expected to enter upon the trial at the next summer assizes. The defendant being in contempt, before the trial, for non-payment of the costs awarded upon his motion, the plaintiff moved that the trial be stayed, or postponed, until such costs were paid:

Sir L. *Shadwell*, V. C., in 1839, said:

"At the time when the Lord Chancellor's order was made, the defendant was not in contempt. The order is still in force; and I cannot understand how the circumstance that the defendant has subsequently come into contempt, can give the plaintiff the right to postpone the trial of his action, which, to a certain extent he is under obligation to try. The Defendant may, perhaps, clear his contempt before the trial, but *whatever may be the circumstances of the defendant*, the order of the court must remain as it is."

Bickford *vs.* Skews, 10 Sim., 193–196. (*)

6. The defendant, though attached for want of answer, having excepted to the bill for scandal and impertinence and obtained an order of reference to the master, the plaintiff, on the ground of the defendant's contempt, moved that the exceptions be taken from the files and the order discharged, but the motion was disallowed.

(*) McDonald and White, it will be remembered, were in no contempt, *when the cause was certified to the General Term*, there "to be *heard*," in the first instance.

Sir L. *Shadwell*, V. C., in 1841, referring to Lord Bacon's Ordinance and to *Bates vs. Wilson* (*sup.*) observed:

"Until the reference for scandal is disposed of, the Defendant cannot tell what he ought to answer, and, in my opinion, although he is in contempt, he has a right to call upon the Court to tell him what it is he is bound to answer."

Everett *vs.* Prythergch, 12 Sim., 363–364.

The reference here upheld, was considered, of course, *as a measure of defense.*

7. The defendant, while in contempt, having filed exceptions to the report of a master, and obtained the usual order to set them down for hearing, the plaintiff moved that the exceptions be taken from the files and the order discharged, on the ground of the incapacity of the defendant to take any active step in the cause, before purging his contempt.

But, in 1845, Sir L. *Shadwell*, V. C., said:

"A party in contempt is entitled, notwithstanding his contempt, to appear and resist any proceeding taken against him in the cause. In this case, the step taken by the defendant, in filing the exceptions, was purely *in the way of resistance.* If the order to set down the exceptions, were necessary for the purpose of preventing the confirmation of the report, that step also must be considered as a proceeding taken merely in his own defense, and would be therefore regular."

Morrison *vs.* Morrison, 4 Hare, 590–591.

8. Where the hearing of an appeal taken by a petitioner, stood over, at the request of the respondent, and the petitioner afterwards came into contempt, it was held, in 1847, by Lord *Cottenham*, that the subsequent contempt of the petitioner could not prevent the hearing, which had been originally postponed at the instance of the respondent.

Bristowe *vs.* Needham, 2 Phil., 190.

9. An accountant, charged by the master with certain moneys, prosecuted an appeal, while in contempt and ordered to be committed, for the non-production of documents, upon the accounting. It was objected that the accountant could not be heard.

Held, in 1851, by Knight *Bruce*, V. C., upon the authority of King *vs.* Bryant (*sup.*) and Wilson *vs.* Bates (*sup.*) that the objection was untenable.

Ex parte Chadwick, 5 Eng. Law and Eq., 83.

10. In 1853, the Vice-Chancellor said:

"The rule which prevents a party in contempt from proceeding in his cause, admits of two exceptions—one where the party is applying to get rid of the process by which he has been placed in contempt, and the other where he is merely defending himself from any proceeding of his adversary."

Reeve *vs.* Hodson, 10 Hare, app'x XLI, XLII, XLIII.

11. In 1859, the plaintiff, though in contempt, for non-payment of costs, was permitted to have discharged, upon motion, an order which had been obtained against him by the defendant, at chambers, and not in court, upon notice.

Futvoge *vs.* Kennard, 2 Giff., 110.

12. In 1863, the defendant to a bill of foreclosure, after answering the same, filed a *cross-bill*, which, on demurrer, was dismissed, with costs, and, afterwards, without payment of such costs, filed in the original cause, both "a concise statement," and certain interrogatories to be answered by the plaintiff. The right of the defendant to file the statement and interrogatories was, on the one hand, resisted, on the ground that he ought not to be permitted, while in contempt, to harass the complainant by steps which amounted to a second cross-bill, and supported, on the other, upon the theory, that the steps taken by the defendant were *modes of defense*, which, notwithstanding his contempt, he might lawfully employ.

"*Wood*, V. C., said, that, according to the general rule, a defendant, though in contempt, was at liberty to take every step necessary for his defense. He looked upon this mode of proceeding as of a nature purely defensive, and the defendant was therefore entitled to file a concise statement and interrogatories, which were material for his defense, and the plaintiff must answer within the usual time."

Fry *vs.* Ernest, 12 Weekly Rep., 97.

13. For disobedience to certain orders requiring them, as executors, to execute powers of attorney, and to perform

other acts, whereby the Receiver appointed for the estate of the testator might collect that estate, the defendants stood in contempt and attachments were issued against them.

While so in contempt, the defendants, in 1869, moved for an order requiring the plaintiff, who was their coexecutor, to make the usual affidavit, as to documents in his possession.

This motion was resisted on the ground that the defendants were in contempt.

"The Vice-Chancellor said, that although the contempts committed had been of the most flagrant kind, as the documents were required by the defendants for the purpose of defending themselves, he had no *jurisdiction* to refuse the order."

Haldane *vs.* Eckford, Law Rep., 7. Eq., 425.

14. See, also, Plumbe *vs.* Plumbe, 3 You. & Coll., 622, and cases collected in 1 P. C. Coop. (*temp.* Lord Cottenham,) 205–206, and 1 Dan. Ch. Pract., 505, note 2, (5th Am. ed.)

15. With these authorities, the passage, often cited, from *Gilbert's Forum Romanum*, 102, (Lond. an. 1758,) is entirely consistent, if it be correctly apprehended.

The passage is as follows:

"And upon this head, it is to be observed, as a *general rule*, that the contemnor, who is in contempt, is never to be heard

by motion or otherwise, till he hath cleared his contempt, and paid the costs: As for example, *if he comes to move for anything, or desires any favor of the court*, if the other side says, or insists he is in contempt, tho' 'tis but for an attachment for want of answer, which if not executed is only ten shillings, and if executed, is only twelve shillings and six pence, yet even in this case, he is not entitled to be heard, till he hath paid these costs (however small they are), he must first pay them to the party or his clerk in court, and produce a receipt for them in open court, before he can be heard; and this is always allowed as a good cause against hearing of the contemnor in any case whatsoever."

The *hearing* here declared to be forbidden to a party while in contempt, is evidently a hearing upon any motion, request or proceeding in which such party *assumes the aggressive*, or in which *he seeks some favor or indulgence from the court.*

Nor are the following cases opposed to the position assumed in the Brief.

1. *Vowles vs. Young*, 9 Ves., 171, 173 (an. 1803).

In this case, which is somewhat obscure as to the facts, it was said:

"As to the contempt the general rule is, the parties must clear their contempt before they can be heard."

2. In *Sidgier vs. Tyte*, 11 Ves., 202 (an. 1805), it was held, that after the plaintiff had taken an office copy of the answer, the answer, though filed when the defendant was technically in contempt, could not be removed from the files, on the ground of irregularity.

3. In *Odell vs. Hart*, 1 Moll. (Irish Ch.), 492 (an. 1828), the defendant (a clergyman), who had been attached for contempt, for the non-production of certain deeds, moved that the attachment be vacated, for irregularity. This motion was granted.

Lord Chancellor *Hart* said:

"A party in contempt may move by counsel to set aside the order against him, by which he is declared to be in contempt, for irregularity in that order, without coming *in vinculis*, but for no other purpose without submitting himself to custody."

His Lordship, it must be supposed, was here referring to motions made by the contemnor, *aggressively*, and not by way of defence merely to proceedings conducted against him.

4. In *Coyle vs. Meyne*, 16 Beav., 548 (an. 1853), an answer filed by the defendant, when he was technically in contempt, was removed from the files for irregularity, the situation being distinguishable from that in Sidgier *vs.* Tyte, *supra*.

The right of resistance, is then, in the English Chancery, the right even of a party in contempt; and this principle is part of the equity jurisprudence of the national government.

Where, in New York, a defendant, for his contempt, was, by order, *stayed in his appeal from the judgment of contempt*, the Court of Appeals, after referring to cases in which persons in contempt had been denied a hearing, *when soliciting some favor, or indulgence*,—said:

"It is to be observed, however, that in the cases cited, the disability to be heard in court is not a punishment inflicted upon the party in contempt, by the *express terms of the order or decree adjudging him in contempt.* Being in contempt, he came before the court on motion, or otherwise, and was met by an objection from his adversary, that for that reason he could not be heard. In the case in hand, the disability to proceed on his appeal *is a punishment inflicted affirmatively and directly by the order.**

"But the Special Term got no right to inflict such punishment from the statute law. That provides for fine and imprisonment. If the Special Term had the ability to impose such punishment as it has, it is found in its inherent power as a court of equitable powers and jurisdiction. But as such, it could take *no greater power than the settled practice of the court has established as belonging to it.* And it will be seen from the cases cited, that the court has not exercised the

---

*This disclaimer of all jurisdiction to debar the defendants, by reason of their contempt, from the benefit of such active proceedings as were required for their defense, is in striking contrast with the jurisdiction assumed and exercised by our own local court to deprive McDonald and White of the benefit of their perfected and passive defense, at the request of the plaintiffs.

See Hovey *vs.* McDonald, 3 McA. (D. C.), 186.

power of preventing the party from moving to rid himself of the contempt adjudged, by showing that the order was erroneously granted."

Brinkley *vs.* Brinkley, 47 N. Y., 50–51.

And it is equally true, that the inferior courts of the United States—including the Supreme Court of the District of Columbia—have no greater inherent power than the settled practice of those courts has established as belonging to them.

The result of the authorities is correctly stated by Mr. *Daniell*, in treating of the "*Effect of a Contempt upon the proceedings in the Cause.*"

"The rule," he remarks, "that a party in contempt cannot move till he has cleared his contempt, is, in practice, *confined to cases where such party comes forward voluntarily, and asks for an indulgence;* and, therefore, a defendant cannot object to a cause being heard because the plaintiff is in contempt."

1 Dan. Ch. Pract., 505 (5th Am. ed.).

"And, in general, whenever a party in contempt is entitled to be heard, there exists a right of appeal, and appli-

cation may be made with immediate reference to the motion upon which he is so privileged to be heard, or for the purpose of obtaining evidence in support of it."

Id., 507.

In 1823, the plaintiff having moved for a Receiver, the defendant, though in contempt, was permitted to be heard, despite the objection of the plaintiff.

Sir *Wm. McMahon*, M. R., said:

"The general rule is, that when a party is in contempt, he will not be allowed to oppose the relief sought by the plaintiff by contradicting the allegations in his bill, or bringing forward any defense, or alleging new facts, neither will he be heard by affidavit, except it be made with a view of purging his contempt. But he may be heard to direct the attention of the court to any error or insufficiency in the plaintiff's own case, as made by the bill, for example, if it should appear by the bill that the plaintiff's charge extends over white acre, and the plaintiff, by motion, sought a receiver over black acre."

—— *vs.* Lord Gort, 1 Hogan (Irish Ch.), 77–78.

Acc: Valle *vs.* O'Reilly, 2 *Id.*, 199 (an. 1824).

In the case decided by the Master of the Rolls, in Ireland, the contempt had been committed, indeed, while the proceedings were still *in fieri*.

But the principle decided in that case is equally applicable, where the contempt is committed after the record has been made up for final hearing, upon pleadings and evidence perfected on both sides.

For the judgment, or decree, sought by the plaintiff, and to be pronounced by the court, ought regularly to be authorized, not by the allegations of his complaint, but by the record in its entirety.

"*Judgments* are the sentence of the law pronounced by the Court *upon the matter contained in* the record." (3 Bl. Com., 395.)

And "*a decree* is a sentence or order of the Court, pronounced on hearing and understanding *all the points in issue*, and determining the right of all the parties to the suit, according to equity and good conscience."

2 Dan. Ch. Pract., 986 (5th Am. Ed.).

In order to establish the nullity of the proceedings conducted against McDonald and White, the full vigor of the principles which prevailed in the English Chancery, need not be asserted nor invoked.

The defence possible to those individuals, upon the merits, had been already perfected and closed, upon answer and evidence. And to have a judicial consideration of the legal effect of that defence, was a *right*, which no motion, nor other action, upon their part, could, in point of law, strengthen or improve.

7. *Of the want of occasion to proceed against McDonald and White, in a manner contrary to law.*

No adequate reason can be assigned for proceeding against McDonald and White, in the Supreme Court of this District, otherwise than according to those rules and principles which had been established (there and elsewhere,) in the national system of equity jurisprudence.

If, upon the case made by the pleadings and the evidence, the plaintiffs were entitled to a decree against McDonald and White, relief would be administered, as of course, when that case, already directed "to be *heard*," should be judicially considered.

And if McDonald and White failed to appear, or to be represented, when the case was reached on the calendar, the hearing might proceed *ex parte*.

It is difficult to avoid the suspicion, that the method of procedure actually employed by the plaintiffs, was selected *with the purpose* of excluding any judicial examination of the merits of the controversy, as disclosed upon pleadings and proofs.

Contrary to Rule 86, prescribed for the Circuits by this Court (Rec., p. 70), and in defiance of Rule 83, prescribed for its own practice, by the Supreme Court of the District of

Columbia (Rec., pp. 90–91), the final decree against McDonald and White is replete *with recitals of the facts charged*, or supposed to be charged, *in the original and amended bills* (Rec., pp. 57–58), upon which bills alone, the cause was determined.

The *evidence* on behalf of McDonald and White was not, in terms, removed from the files, with the answer.

The decree *pro confesso* of February 12, 1878, and the style and contents of the final decree of April 17, 1878, whereby the decree *pro confesso* was made absolute, show, with sufficient distinctness, that that evidence was, in fact, wholly unconsidered by the court.

But it is worthy of observation, that it does not appear, after 1876, *that the existence of any evidence in the cause was actually made known to the court.*

The cause, completed upon pleadings and proofs, had been certified from the Special Term for hearing before the General Term, on the 18th day of April, 1878.

It was on the 19th day of June, 1876, that the General Term had first directed the restoration of the fund to the registry of the court.

But in none of the proceedings thereafter taken—in none of the orders or decrees thereafter passed—is allusion to be discovered to the evidence, or to the existence of evidence, in the cause.

VI. *Of the practice of the courts of New York, in cases of contempt.*

1. If the jurisdiction and practice of the national tribunals, when sitting as courts of equity, have been correctly ascertained and defined, it cannot, of course, be material to the argument, to investigate the diversities of decision in the courts of particular States.

2. But local experience might be safely challenged to furnish or recall any adjudication in that State, which authorizes her own tribunals, or concedes any power to the British courts, after a cause has been finally, and upon both sides, closed upon the pleadings and evidence, and set down for hearing, to render a final judgment, or decree, against the defendant, *upon the naked allegations of the complaint alone*, on account of some contempt committed by him in that cause, subsequently to the setting down of the same to be heard.

3. It seems to have been formerly recognized by the courts of equity in that State, that though one in contempt, was

not to be heard when asking *any favor or indulgence*, his right of resistance to proceedings taken against him, was left unforfeited and unaffected by the contempt.

Johnson *vs.* Pinney, 1 Paige, 646;
Rogers *vs.* Patterson, 4 *Id.*, 455;
Ellingwood *vs.* Stevenson, 4 Sandf. Ch., 368;
Krom *vs.* Hogan, 4 How. Pr., 226;
Field *vs.* Chapman, 13 Abb. Pr., 330.

It was upon such the distinction recognized in the Chancery practice of New York, that the highest court of New Hampshire proceeded, in 1865, in *Robinson vs. Owen*, 46 N. H., 39, 40.

The Court of Appeals of New York, in referring to some of the above cases arising in that State, and to others determined in the English Chancery, observes:

"The conclusion to be drawn from them is this: That a party in contempt, and until he is purged of it, will not be permitted to ask for the *favor* of the Court, nor to take any *aggressive* proceedings against his adversary, *but that it is his right to take measures to protect himself, and* to make any motion designed to show that the order adjudging him in contempt was erroneous."

Brinkley *vs.* Brinkley, 47 N. Y., 49.

4. It cannot be denied, however, that since the decisions made by the Court of Chancery, in New York, answers of defendants, have there been removed from the files, for contempt, and the cases ordered to proceed as though no answers had been interposed.

Farnham *vs.* Farnham, 9 How. Pr., 231;
Barker *vs.* Barker, 15 *Id.*, 568;
Busbane *vs.* Busbane, 67 *Id.*, 184;
Brinkley *vs.* Brinkley, 47 N. Y., 42–49;
Walker *vs.* Walker, 20 Hun., 450;
Walker *vs.* Walker, 82 *Id.*, 261, 263–264;
S. C., 8 Abb. N. Cas., 443.

But the later cases have been proceedings either for *alimony* or for *divorce.*

And though the removal of the answer of the defendant from the files, may have placed him, in some instances, under great disadvantages—the removal was not attended, it is believed, in any of such later cases, *with an immediate right to judgment* on the part of the plaintiff, but the claim of the latter, if not already established by decree,—as in the case of *alimony*,—was required to be made out *by proof*, notwithstanding the removal of the answer from the files.

5. How far the practice of New York, in Divorce Cases, agrees with that of England, or of the States, in general, may be seen in APPENDIX E, (post, pp. 182–186).

6. It may be added, that if the conclusions reached in *Walker vs. Walker*, 82 N. Y., 261, respecting the practice of the English Chancery, in cases of contempt, are consistent with the conclusions reached in Brinkley *vs.* Brinkley (ante, p. 148), respecting that practice, they are *not* in conformity with that course of decision in the English Chancery, which we have attempted to illustrate.

And it is not too much to say, that the cases of

Vowles *vs.* Young, 9 Vesey, 173 (an. 1803);
Heyn *vs.* Heyn, 1 Jacobs, 52 (an. 1821);
And Clark *vs.* Dew, 1 Russ. & My., 103 (an. 1829),

which are cited by the learned Court in *Walker vs. Walker*, afford no manner of countenance to the position, that the general incapacity of a party to be heard, *while he remains in contempt* deprives him of *the right* (*acquired by answer, or otherwise,*) *of resisting proceedings against him*, though the adjudications of the Court of Appeals of New York, upon the principles and practice of the English High Court of Chancery, are, of course, incapable of furnishing a rule of decision to the Federal tribunals, in respect of such principles and practice.

Neves *et al. vs.* Scott *et al.*, 9 How., U. S., 271, 272;
Kirby *vs.* Lake Shore, &c., R. R., 120 U. S., 137–138.

The extensive litigation arising out of the award rendered in favor of *McDonald*, and over the proceeds thereof, may be traced, *in part*, in the following decisions:

Phelps vs. McDonald, 2 MacA. (D. C.) Rep., 375;
Phelps vs. McDonald, 99 U. S., 258;
Phelps vs. Elliott, 29 Fed. Rep., 54;
Phelps vs. Elliott, 35 *Id.*, 462;
Hovey et al. vs. McDonald et al., 3 MacA. (D. C.) Rep., 184;
Hovey vs. McDonald, 109 U. S., 150;
Hovey vs. McDonald, 45 N. Y. Sup. Ct. Rep., 606;
Hovey vs. McDonald, 110 U. S., 619;
Hovey vs. Elliott, 53 N. Y. Sup. Ct. Rep., 331;
Hovey vs. Elliott, 118 N. Y., 124;
Phelps vs. Elliott, 140 U. S., 694;
Hovey vs. Elliott, 61 N. Y. Sup. Ct. Rep., 409;
Hovey vs. Elliott, 145 N. Y., 126.

The nature of the powers assumed by our local court, as well as the pecuniary importance of the controversy, must constitute the apology that is offered, if they fail to merit all the indulgence requested, for so extended an argument.

JOHN SELDEN,
Counsel for Defendants in Error.

APPENDIX A.

(*Ante, p.* 71.)

Of Indictment of Contemnors and of Their Arrest when Fugitives.

(1.) Contempts of national tribunals, punishable *upon information or indictment.*

Contempts, both at common law and under the judicial system of the United States, are punishable upon *information or indictment*, as well as by summary proceedings.

4 Bl. Com., 283, 288;
U. S. *vs.* Jacobi, 1 Flippin C. C., 108;
U. S. *vs.* R. R. Co., 16 Fed. Rep., 853;
In re Mullee, 7 Blatch., 25.
In re Terry, 37 Fed. Rep., 649.

Indeed, as we have seen, (*ante*, p. 58,) it is only in certain specified cases—including disobedience to judicial orders and decrees—that the *summary* punishment of contempt is now permitted, under the laws of the United States.

(2.) Apprehension of fugitive or absconding contemnors, under the laws of the United States.

Nor can flight or removal protect the offender, within the limits of the United States.

Under the construction placed, with a single exception, (*In re* Graves, 29 Fed. Rep., 60,) it is believed, upon Revised Statutes United States, section 1014, the person adjudged guilty of contempt, may be arrested, or imprisoned, or held to bail to appear before the Court having cognizance of the contempt, by any Federal Judge, or Circuit Court Commissioner, or by any judicial officer, or civil magistrate, of the State wherein the offender may be found.

Fanshawe *vs.* Tracy, 4 Biss., 498;
U. S. *vs.* Jacobi, 1 Flippin C. C., 108;
In re Ellebere, 13 Fed. Rep., 530; 4 McCrary, 449;
In re Acker, 66 Fed. Rep., 293, 294.

APPENDIX B.

(*Ante, p.* 76.)

As to Certain Statutes of Maryland.

1. "In order to enforce obedience to the process, rules and orders of the Chancery Court, in all cases where any party or person shall be in contempt for disobedience, non-performance, or non-observance of any process, rule or order of the chancellor or chancery court, or for any other matter or thing whatsoever, whereby or wherein a contempt, according to the rules, law, practice, or course of the said court, may be incurred, such party or person, shall, for every such contempt, and before he shall be released or discharged from the same, pay to the register in chancery, (to be by him accounted for upon oath and paid, at the end of every six months, to the treasurer of the Western Shore, to the use of the State,) a sum not exceeding ten pounds current money, as a fine for the purgation of every such contempt, and that the said party or person being in court, upon any process of contempt, or otherwise, upon the order of the chancery court, shall and may stand committed, and remain in close custody until the said process, rule or order shall be fully performed, obeyed and fulfilled, and until the said fine or

fines for such contempts imposed by the said court, and the costs, shall be fully paid and discharged."

Act Maryland, 1785, ch. 72, sec. 22;
Thomp. Dig. Laws D. C., 137.

"The chancellor shall and may nominate and appoint a messenger to attend the chancery court, and to serve, execute and carry into effect such process, orders, and decrees thereof, as the chancellor may direct, and the parties require to be directed or delivered to such messenger, to be by him served, executed, or carried into effect," &c.

Act Md. 1785, ch. 72, sec. 32;
Thomp. Dig. Laws D. C., 143.

"The chancellor shall have full power and authority to commit any person or persons in contempt for not obeying or complying with any rule, order or decree of the chancellor, to the custody of the messenger, by him to be closely confined in the gaol of Anne Arundel county, or in the gaol of the county of which such person shall be an inhabitant, or where he may be taken, unless he be the sheriff of the county, in which case he may be confined in the gaol of Anne Arundel county, or the gaol of any county adjoining the county of which he shall be sheriff, until such person or persons respectively be released and discharged by order of the chancellor."

Act of Maryland, 1785, ch. 72, sec. 33;
Thomp. Dig. Laws D. C., 144.

2. For the enforcement of *final decrees*, as distinguished from *interlocutory orders*, there were special provisions. A decree might be enforced *by attachment of contempt—attachment with proclamations—sequestration* of the property of the defendant "sufficient to satisfy the demand of the plaintiff in the decree specified and declared," and for "payment and satisfaction," out of such property, to the plaintiff, "according to the true intent and meaning of the decree,"—by *fi. fa.* against sufficient property of the defendant "to satisfy the demand of the plaintiff in the decree specified,"—by *ca. sa.*, as at law,—or by *injunction*, requiring any estate or effects of the defendant, "whereof the possession or a sale is decreed," to be by him delivered up, "according to the tenor and import of such decree."

And, the defendant being arrested and brought before the court, upon process of contempt to compel performance of the decree, the court may make an *order* for his *commitment*,—for *sequestration*,—*payment*,—or *injunction*, as aforesaid, "until such decree or order shall be fully performed, according to the tenor and true meaning thereof and the contempts cleared."

Act of Maryland, 1785, ch. 72, sec. 25;
Thomp. Dig. Laws D. C., 139–141.

These provisions very clearly illustrate the distinction drawn by Lord *Hardwick*, in 1739.

"A plaintiff cannot have the same benefit, in carrying on the several processes upon a contempt of the defendant, before the hearing, as upon an absolute decree; for, in the

latter case, the plaintiff, after the processes have been exhausted and goods and estate sequestered under them, may have both applied to satisfy his demand, which he cannot have upon processes for contempt only, and therefore there is a natural and essential difference between the two."

Davis *vs.* Davis, 2 Atk. 24 (1st Am. Ed.).

And see, Rules 83, 84, 85, 86 of the Supreme Court of the District of Columbia, and Rules, 7, 8 and 9 prescribed by the Supreme Court of the United States for the Circuit Courts, when sitting in equity.

3. The 5th section of the Maryland Act of 1799, ch. 79, is quoted, in this connection, merely to avoid misapprehension.

The section has no reference whatever to the duty or powers of the chancellor, *after appearance and answer.*

It was intended to render it uniformly discretionary with the court, whether, upon non-appearance by the defendant, either after service of summons or after publication, the bill should be taken *pro confesso,*—absolutely, as in some

cases, by previous laws required (Thompson's Dig. Laws D. C., 119–120; 142–146,) or as permitted in others, only upon depositions, to be obtained *ex parte*. (*Id.*, 134–135; 158–161.)

The section is as follows:

"In certain cases, and particularly where a defendant hath *been duly summoned*, and has stood out of the process of the Court, the Chancellor is by law directed absolutely to take the bill *pro confesso*, *and in other cases of non-appearance of the* defendant, he may at discretion either take the bill *pro confesso*, or direct a commission for taking depositions; and whereas, *it appears unreasonable that in any case whatever the Chancellor should be directed to take the bill or bare allegations of a suitor pro confesso*, in all cases whatsoever, where the Chancellor is authorized to decree *without the appearance of the defendant* or the defendants, it shall *be at the discretion of the Chancellor*, either to take the bill *pro confesso*, or direct a commission for taking depositions *ex parte*, as by law directed in certain cases where the defendants are non-residents."

Act Maryland 1799, ch. 79, sec. 5;
Thomp. Dig. Laws D. C., 165.

See these enactments examined in—

Alexander's Maryland Chancery Practice, 20–28.

4. There remain to be noticed, in connection with certain legislation by Congress, two further enactments of the State of Maryland.

(*a.*) By an Act of Maryland of 1796, ch. 43, section 7, judgment might be rendered, of nonsuit, against a plaintiff, and by default, against a defendant, who failed to comply with an order made, after notice, to produce copies of books or other writings, or to answer a mere bill of discovery, in cases and under circumstances where the production of the books or other writings, or an answer to such a bill might be compelled "by the ordinary rules of proceeding in chancery."

Thomp. Dig. Laws D. C., 203.

And by Act of Maryland of 1798, ch. 84, section 2, the chancellor was given power and authority "to require and decree" the production of books, writings or papers, or copies thereof, on the application of either party, whether in an action at law, or upon bill for relief or for discovery, in equity.

Thomp. Dig. Laws D. C., 203–204;
See Buckingham *vs.* Perricord, 2 Bland Md. Ch Rep., 457 (an 1830).

(*b.*) The Act of Congress of September 24, 1789, section 15, (1 Stat., 82,) now Revised Statutes of the United States,

section 724, had conferred upon the courts of the United States, in trials of actions at law, the same powers which by the Maryland Act of 1796, had been vested in the tribunals of that State, in the trials of like actions.

See Boyd *vs.* U. S., 116 U. S., 531.

These enactments are suggestive, of course, of the ancient incompetency of the *parties* as witnesses, *except through bills of discovery, in equity.*

It has been under the 15th section of the Judiciary Act of 1789, *and not under the Maryland Act of* 1796, that the production of books and other writings, in actions at law, has been compelled in the District of Columbia.

Maye *vs.* Carberry, 2 Cranch C. C., 336;
Bank U. S. *vs.* Kurtz, *Id.*, 342;
Central Bank, &c., *vs.* Tayloe, *Id.*, 328;
Waller *vs.* Stewart's Exex., 4 *Id.*, 532;
Thompson *vs.* Selden *et al.*, 20 How. (U. S.), 194–197.

(*c.*) It was the design of the 15th section of the Act of Congress of 1789, to obviate the necessity of resorting to *chancery jurisdiction*, in order to obtain a discovery in courts of law, by conferring upon such courts power to compel, upon motion, those discoveries which, in equity, might be compelled by original bill, or by cross-bill.

It "was intended to prevent the necessity of instituting suits in equity, merely to obtain from an adverse party, the production of deeds and papers relative to the litigated issue."

Geyger's Lessee *vs.* Geyger, 2 Dall., 333;
See Merchant's Bank *vs.* State Bank, 3 Cliff., 201;
3 Greenl. Ev., § 304.

Where the defendant failed to answer an original bill for discovery, it might be *taken pro confesso*, and the bill, or an examined copy thereof, could be read against him in any court of law or equity, with the same force and effect as his answer might be so read, when expressly admitting the averments of the bill.

1 Dan. Ch. Pr., 497, 530–531 (5th Am. Ed.); 2 *Id.*, 1559.

But where a defendant in equity, having answered the original bill, desired some discovery from the complainant in that bill, the defendant "could, in general, only obtain such discovery by means of a cross-bill. Upon such a bill being filed, the plaintiff in the original suit, in his character of defendant to the cross-bill, becomes liable to the application of the same rules concerning the production of documents as a defendant in any other case."

2 Dan. Ch. Pr., 1819 (5th Am. Ed.);
3 Greenl. Ev., § 302.

Hence, if the facts set forth and sought to be discovered by the cross-bill were such, in their nature, as to constitute a defense to the original bill, a decree *pro confesso*, upon the cross-bill, must be attended, in general, with a dismissal of the original bill.

The proceedings authorized in the courts of law, by section 15 of the Judiciary Act of 1789, were drawn from the analogies thus furnished by the practice in courts of equity.

(*d.*) Similar proceedings are authorized by the laws of New York.

Rice *vs.* Ehle, 55 N. Y. 518;
Walker *vs.* Walker, 82 *Id.*, 264.

And by the laws of other States.

Bish *et al. vs.* Beatty, 111 Ind., 403–405 (an. 1887);
Saylor *vs.* Mockbie, 9 Iowa (Withrow), 212–213;
Davis *vs.* Flagg, 44 N. Y. Eq., 109 (an. 1888);
Maxwell *vs.* Rives, 11 Nevada, 221;
Cleveland *vs.* Burnham, 60 Wisc., 22.

APPENDIX C.

(*Ante*, p. 92.)

Of the payment of fines imposed by the Circuit Courts, in Patent Cases, for contempts of interlocutory injunctions, unto the parties injured by such contempts.

In *Patent Cases*, a practice has been established, in recent times, upon some of the circuits, to require the defendant, when fined for contempt, in disobeying an injunction, to make payment of the fine to the plaintiff, by way of indemnifying the latter for his costs and losses occasioned by such disobedience.

Such, for example, are the cases of—

Fischer *vs.* Hayes, 6 Fed. Rep., 63 (an. 1881); 19 Blatch., 13;

Macauley *vs.* White Sewing Machine Co., 7 Fed Rep., 698 (an. 1881);

Matthews *vs.* Spragenburg, 15 *Id.*, 113, per *Wheeler, J.* (an. 1883);

In re North Bloomfield Grave Min. Co., 27 Fed. Rep., 795, per *Sawyer, J.* (an. 1886);

Burr *vs.* Kimbark, 29 Fed. Rep., 428, per *Blodgett, J.* (an. 1887);

See Gould *et al. vs.* Sessions, 67 Fed. Rep., 163 (an. 1895); U. S. Circ. Court App., 2d circ.

Language, distinguishing contempts into civil and criminal contempts, is also to be found, in other cases,—cases in which such language and distinction seem unnecessary, at least, for their decision.

From the imposition of fines, for remedial purposes, in Patent Cases, the path was easy—*facilis descensus Averni*—to the imposition of fines, for like purposes, in other proceedings, at least, after final decree.

Thus, where, in 1886, the defendant had disregarded a final decree, restraining him from discharging "mining tailings" into a certain creek, and been fined, for such his contempt, $1,500, it was ordered that the money when collected be paid, with costs, to the complainant, "as a compensation, in part, for the large expenses which must have been incurred in securing evidence and prosecuting the proceedings for contempt."

In re North Bloomfield Gravel Mining Co., 27 Fed. Rep., 795, 800, per *Sawyer, J.*

And where, in 1896, the defendants, through negligence, but without willful intent, had disobeyed a final decree, enjoining them from polluting the White River, and had been fined $250, it was ordered that the money be paid, with costs, to the clerk, for the use of the complainant.

Indianapolis Water Co. *vs.* American Strawboard Co., 75 Fed. Rep., 978–980, per *Baker, J.*

In this last case, the damages resulting from the violation of the injunction, were deemed proper for ascertainment by a jury, in an independent proceeding, but the Court asserted,

without, however, exercising, the power to exact bond from the defendants to answer the award of the jury, and declared its right, in case the damages were otherwise capable of liquidation, to *commit* the defendants until they should satisfy those damages.

Id., 979–980.

(*a.*) *Of the punitive nature*, nevertheless, of such fines.

Though the fine imposed for contempt is directed to be paid over to a party to the cause, the proceeding has still been considered a criminal proceeding.

Fischer *vs.* Hayes, 19 Blatch., 13, 18, 6 Fed. Rep., 63, *Blatchford, J.*
In re Cary, 10 Fed. Rep., 629, note.

(*b.*) Of the tendency of many of the Circuit Courts to enforce no private remedy through the prosecution of contempts.

In some circuits, where the practice of others, *in patent cases*, has been recognized, that practice has been either followed with hesitation, as by *Brown, J.*, in 1882, (Searls *vs.* Worden, 13 Fed. Rep., 716; see S. C., 121 U. S., 14,) or discountenanced entirely, as by *Krekel, J.*, in 1885, as contrary

to the altered tendency of judicial decision. (U. S. *vs.* Berry, 24 Fed. Rep., 783.)

Upon still other circuits, the process of contempt acts only upon the public offense, and, for public ends alone, enforces obedience to judicial authority. It can furnish no civil remedy, nor redress any private injury.

See Durant *vs.* Supervisors, 1 Woolw., 381, per Justice *Miller;*
Steam Stone Cutter *vs.* Windsor, 3 Fed. Rep., 301;
Fanshawe *vs.* Tracy, 4 Biss., 498, per *Blodgett, J.;*
In re Ellerbe, 13 Fed. Rep., 530; 4 McCrary, 449;
In re Litchfield, *Id.*, 863.

"Its purpose is not to afford a remedy to the party complaining, and who may have been injured by the act complained of. Its purpose is to vindicate the authority and dignity of the court."

Vanzant *vs.* The Argentine Mining Co., 8 Fed. Rep., 725;
In re Crary, 10 Fed. Rep., 629, note;
U. S. *ex rel.*, &c., D. & N. O. R'y Co. *vs.* Atch. & S. F. R'y Co., 16 Fed. Rep., 853;
Denver & N. O. R'y Co. *vs.* Topeka, &c., R'y Co., 5 McCrary, 291;
U. S. *vs.* Berry, 24 Fed. Rep., 585;
Kirk *vs.* Milwaukee Dust Collector Co., 26 *Id.*, 501.

Nor can the courts of the United States, upon a proceeding for contempt, make any order whatever, directly in the nature of process, or further directions, for the enforcement of their decrees.

Fischer *vs.* Hayes, 6 Fed. Rep., 63;
U. S., &c., *vs.* Atch., &c., R'y Co., 16 *Id.*, 853;
See Mallory Manuf. Co. *vs.* Fox, 20 *Id.*, 409.

In such a proceeding, "*the court has no jurisdiction to make any* order in the nature of future direction for the enforcement of the decree."

Vanzant *vs.* The Argentine Mining Co. (*sup.*);
U. S. *ex rel.*, &c., *vs.* Atch., &c., R'y Co. (*sup.*);
Denver, &c., R'y Co. *vs.* Topeka, &c., R'y Co. (*sup.*).

Under the last class of cases, the Circuit Court may, indeed, indirectly and incidentally compel obedience to its order. It may impose upon the offender a fine, and direct his commitment until he perform, or establish his inability to perform, its requirement.

It can proceed no further.

If the offender continue recalcitrant, the remedy, *by process of contempt*, is exhausted.

(c.) Of course, it has never been suggested, in any of the foregoing decisions, *that the limits imposed by law for the punishment of contempts, could be in anywise exceeded for the purpose of enlarging the civil remedy.*

For the Revised Statutes of the United States, section 725, relates to "ALL *contempts*" of judicial authority, and where the legislature has made no exception, none can be prescribed by the courts of justice.

Much less, has it ever been conceived to be lawful, to strike from the files the answer of a defendant—to refuse consideration to his proofs—and, thereupon, to render a final decree against him,—on the ground of his contempt.

And the only inquiry, pertinent to the present controversy, which arises under the view now being taken of the section in question, is not whether public wrong was sought to be redressed, or private remedy to be administered, against McDonald and White, *but whether their contempt*—under whatever classification described—*was punished otherwise than by fine or imprisonment.*

In *Hendryx* vs. *Fitzpatrick*, 19 Fed. Rep., 810, a defendant committed by the Circuit Court for a contempt in refusing to obey its order, was released, in 1884, by *Lowell*, J., under the poor laws of the State of Massachusetts.

The validity of this release, when called in question by the plaintiff, was upheld by that learned judge, on the ground that the imposition of the fine was a civil remedy, else the fine must have been payable to the United States alone. He considers that a proceeding for contempt embraces two functions, "one criminal, to punish disobedience, and the other

civil and remedial to enforce a decree of the court and indemnify private persons;" that it has "been usual *in patent cases* to combine the two, and to order punishment, if it is thought proper, or indemnity to the plaintiff, if that is all that justice requires;" (p. 811;) that in Fischer *vs.* Hayes, 7 Fed. Rep., 96, *Blatchford*, J., seems to have modified the opinion previously announced in Mullee's Case, 7 Blatch., 23, and Fischer *vs.* Hayes, 6 Fed. Rep., 96, after the decision of this last case (102 U. S., 121,) in the Supreme Court of the United States; that orders upon defaulting trustees, or assignees in bankruptcy, to pay over money, were of a civil nature and subject to the operation of insolvent and bankrupt laws; that the common forms of proceeding in equity were authorized in courts of the United States under Revised Statutes of the United States, section 813, independently of the provisions contained in Revised Statutes of the United States, section 725; but that if the particular sentence under consideration was criminal in form, it was yet civil, in consequence and effect, because rendered for private benefit. It was not subject to the pardoning power, but to the equitable control of the court which pronounced it.

The operation of insolvent and bankrupt laws, upon fines imposed for contempts, was thus viewed by *Lowell*, J., in *Hendryx vs. Fitzpatrick*, in a light wholly different from that in which the effect of such laws had been previously examined both in the Courts of New York and in *this* Court.*

---

* The learned judge seems to have fallen into some peculiar inaccuracies.

2. *This* Court, he considers, "*expressed a significant doubt*," in Hayes *vs.* Fischer, 102 U. S., 122, whereas no occasion for doubt was there permitted to arise.

2. That in the same case, 7 Fed. Rep., 96, Judge Blatchford *admitted the defendant to bail*, which would not have been done, had the judgment been criminal in its nature,—is, surely, a *non sequitur*, as well as a misconception of the decision of Judge Blatchford.

And his attention does not appear to have been called to such examination.

The defendant to a creditor's bill, who had been enjoined, on the filing thereof, from alienating his property, having thereafter disobeyed such injunction was adjudged in contempt, and fined $3,000, to be paid into the clerk's office, subject to the further order of the court, and $195.51, to be paid to the plaintiff, for costs and expenses, the statutes of New York having specially provided for proceedings as for contempts, to enforce civil remedies.

The defendant having afterwards received a certificate of his discharge in bankruptcy, under Act of Congress, April 11, 1842, was released, on *habeas corpus*, by a Supreme Court Commissioner of the State, from the custody of the sheriff, to whom the defendant had been committed, until such payment should be made.

But on the application of the plaintiff, the *Vice-Chancellor* awarded a new commitment, on the ground that the payments had not been released by the discharge of the defendant in bankruptcy.

This decision was affirmed by the *Chancellor*, and, afterwards, by the *Court for the Correction of Errors*, and ulti-

mately, in 1846, by *this* Court, where, however, no opinion was rendered—the judges in favor of affirmance, differing as to the principles upon which their judgment should be rested.

The People *vs.* Spalding, 10 Paige, 284–287;
Spalding *vs.* The People, 7 Hill, 301, 304;
Spalding *vs.* State of New York, 4 How. (U. S.), 21.

To the contention before the Court of Errors, that the fine imposed upon the defendant should be regarded, under the statute of the State, as a merely civil remedy, *Nelson*, C. J., after examining those statutes, replied:

"Here, in cases confessedly criminal and indictable, and the penalty for which, ordinarily, would go for the benefit of the people, the courts are authorized to impose them, with a view to the indemnity of the party aggrieved, making, at the same time, his acceptance of the fine a bar to any private action for the injury.

"*But the fine imposed is no less a penalty for a criminal act, and intended as a punishment, for the same*, than if inflicted for the benefit of the people. The imposition, in the way prescribed by the statute, accomplishes the *double purpose of* punishment for their misconduct, on the one hand, and indemnity to the aggrieved party, on the other."

Spalding *vs.* The People, 7 Hill, 304;
Spalding *vs.* State of New York, 4 How. (U. S.), 26.

And it appears to be now settled, that commitments by the Federal courts for contempts, are not affected by statutes which abolish imprisonments for debt,

Bogart *vs.* Supply Co., 23 Blatch., 552;
Jeffries *vs.* Laurie, 27 Fed. Rep., 198,

Nor by laws of the United States allowing deductions from the terms of imprisonment fixed by sentence, on account of good conduct.

In re Terry, 37 Fed. Rep., 649.

Of the decisions of this Court upon this subject.

If, from the conflicting practice and opinions of the Circuit Courts, *in patent cases*, we turn to the decisions of this Court, we shall there find no authority for the enforcement of civil remedies, by the process of contempt, in the judicial system of the Union.

(*a.*) In the exercise of its original jurisdiction, this Court treats even the application of a State for an order upon its attorney to pay money into court, as in the nature of a proceeding as for a contempt, and, hence, *as quasi criminal*, and as not amounting merely to the equivalent of an action for debt.

Texas *vs.* White, 131 U. S., appx. XCV.
In re Paschal, 10 Wall., 491.

(*b.*) As to *Worden vs. Searles*, 121 U. S., 14.

Upon bill to restrain the infringement of a certain reissued patent, and for an assessment of damages, there was a preliminary injunction.

Subsequently, and after answer, replication, proofs and hearing, there was entered an interlocutory decree, adjudging the validity of the reissue, awarding a perpetual injunction and directing a reference to the master, for the ascertainment of profits and damages.

Thereafter, by order "entitled in the cause," there was imposed upon the defendants, for their contempt in violating the preliminary injunction, a fine of $250, to be paid to the complainant, the defendants to stand committed until such payment, and by later order, likewise entitled, (the previous order having been reopened,) a fine, on like account, of $1,182, to be thus paid, with such commitment, which latter fine represented the profits made by the defendants, through their violation of the preliminary injunction, and the expenses incurred by the complainant, in prosecuting the proceedings for contempt.

Upon the report returned by the master, under the interlocutory decree, a final decree, for $24,573.91, with costs, was entered against the defendants, who, from such latter decree, appealed to *this* Court, having been already allowed an appeal from the order imposing the fine of $1,182.

The inability of this Court to review the orders imposing these fines, was resisted by the appellee,

(1.) On the ground that the proceedings imposing the fines were criminal in their nature, and,

(2.) Because the power of punishing contempts exercisible under Revised Statutes of the United States, section 725, was "at the discretion of the court."

In respect to the first contention, this Court, speaking through Mr. Justice Blatchford, said:

"We have jurisdiction to review the *final* decree in the suit and all *interlocutory* decrees and orders. These fines were directed to be paid to the plaintiff. *We say nothing as to the lawfulness or propriety of this direction.* But the fines were, *in fact*, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, *if it existed at all*, founded on his right to the injunction, and that was founded on the validity of his patent"* (p. 25).

The court then distinguished the case before it, from the case of *Ex parte Kearney*, 7 Wheat., 39, which was an application for *habeas corpus* by one imprisoned for contempt, in refusing to answer, as a witness, and which application was denied, on the ground that the court was then without appellate jurisdiction in criminal cases (p. 25).

"So," it was said, "the fact in the present case, that, though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse him his expenses, distinguishes the case from that of New Orleans *vs.* Steamship Co., 20 Wall., 387" (p. 26).

In respect to the second contention, this Court, adverting to the terms of the Revised Statutes of the United States, section 725, said:

"We do not think this provision makes the action of the Circuit Court in this case such a matter of discretion that the orders imposing the fines are not reviewable. They were to all intents and purposes, orders in the course of the cause, based on the questions involved as to the legal rights of the parties.

"Although the court had jurisdiction of the suit and of the parties, the order for the preliminary injunction was un-

---

*This Court adjudged the reissued patent to be invalid.

warranted as a matter of law, and the orders imposing the fines must, so far as they have not been executed, be held, under the special circumstances of this case, to be reviewable, under *the appeal from the final decree.* The result is that they cannot be upheld" (p. 26).

The final decree as well as the orders imposing the fines, were therefore reversed, and the cause remanded, with directions to dismiss the bill, with costs, "*but without prejudice to the power and right of the Court to punish the contempt referred to in those orders, by a proper proceeding. The preliminary injunction was in force until set aside.* (See *In re Chiles*, 22 Wall., 157.")

Worden *vs.* Searles, 121 U. S., 14–25–27.

There is certainly nothing in this decision to imply any approval by this Court, of the payment of fines imposed for contempts of judicial authority, unto the parties who may suffer injury from the acts constituting such contempts.

This Court studiously refrained, on the contrary, from expressing an opinion "*as to the lawfulness or propriety*" of orders directing such payment.

It perceived, from the record, *as matter of fact*, that what had been assessed against the defendants below, nominally, by way of fines for their contempts, had been, by interlocutory decrees, actually awarded against them, by way of damages and compensation to the complainant, for the infringement of his reissued patent, upon the validity of which his right, in point of law, to the preliminary injunction depended.

And when this Court determined that the reissue was invalid, it could scarcely be expected that, in reversing the final decree below, this Court should not reverse also those interlocutory decrees in the cause, which had been predicated of the validity of the reissue, and which, whether properly

or improperly, had been entered, in fact, if not in form, for the indemnity of the complainant.

The purpose which this Court here perceived in the proceedings below, has not, perhaps, been always distinguished, with sufficient clearness, from the attitude maintained by this Court towards that purpose itself.

See Gould *et al. vs.* Sessions, 67 Fed. Rep., 164;
Indianapolis Water Co. *vs.* Amer. Strawboard Co., 75 *Id.*, 978.

APPENDIX D.

Wartman vs. Wartman, Taney Dec., 362.

(*Ante, p.* 120.)

The observations made, in 1853, by Mr. Chief Justice *Taney* in *Wartman vs. Wartman*, must be viewed in connection with what, in 1821, was considered by Mr. Chief Justice Marshall "a maxim not to be disregarded," (Cohens *vs.* Virginia, 6 Wheat., 399,) and, in 1838, by Mr. Chief Justice *Taney* himself, as a "just rule of construction," (Garcia *vs.* Lee, 12 Peters, 520,) that general expressions in every opinion "must always be taken with reference to the particular subject-matter in the mind of the court."

Wartman vs. Wartman was a bill in equity filed on behalf of an infant *cestui que trust*, to compel the defendant, as trustee under a will, to account for and pay over certain

moneys which were alleged to be in his hands, and to belong to the infant, the bill also averring the insecurity of the fund, and praying that it might be brought into court, and invested under its authority, to abide the result of the suit. An answer had been filed by the defendant, admitting that he held in his possession $7,544.83 of the fund in controversy, but denying that the plaintiff was the person entitled to the fund, under the will. And, by consent of parties, a commission had been issued to take testimony, in order to prepare the cause for final hearing.

Subsequently, upon petition reasserting the insecurity of the fund, and praying that it might be paid into court, the plaintiff obtained an order *nisi*, directing the defendant to make such payment, and afterwards an order whereby the defendant, instead of paying the fund into court, should be permitted to give bond to satisfy any final decree that might be rendered against him in the cause.

Instead of complying with these orders, or either of them, the defendant answered them, in effect, by insisting that the plaintiff had no title to the fund, and that the defendant had already, in fact, made payment thereof to the persons to whom, in his judgment, it belonged. The answer to one of these orders also contained the request, that they might "*be suspended until the final hearing*,"—a request, it was justly observed by the Chief Justice, which was "nothing more or less than an application to the court to abandon the measures it had taken to secure the fund, because the defendant had determined not to comply with its orders, and to contemn its authority." (Taney Dec., 368.)

It was under these circumstances, and immediately after the language last quoted, that Mr. Chief Justice added:

"It is, moreover, proper to remark, that the defendant, being in contempt, for disobedience to the authority of the Court, is not entitled to be heard on any motion, nor authorized to take testimony, or to proceed in any other manner, until he purges himself of the contempt. This is the well-settled principle of chancery law, and it would be impossible for the court to enforce its authority upon any other principle." (*Id. Ib.*)

The motion, or request, which the defendant had addressed to the court, was for the favor, or indulgence, of *having the orders in question suspended, until the final hearing.* Nor, *except for aggressive purposes*, could it be necessary for the defendant, as the cause then stood, to enter upon any examination of witnesses.

The title of the plaintiff had been expressly denied in the answer filed to the bill, and notwithstanding the issuance of a commission, no attempt had been made by the plaintiff to establish his claim by proof. And as no exigency could arise for testimony *in support of the answer*, in advance of the production of some testimony *in support of the bill*, the defendant, to invert the natural order of proceeding with evidence, must have appealed to the indulgence of the court. The proceeding, on the part of the plaintiff, being directed and confined to the *enforcement of the orders*, it was, of course, incompetent for the defendant, while in contempt, to produce, as of right, any testimony tending to establish error or improvidence *in the orders themselves.*

Whether, if the plaintiff had proceeded to take testimony under the commission, the defendant, though in contempt, might not still do the like, by way *of resisting the suit upon the merits*—was not, nor was required to be, determined in the cause.

The observation, made by Mr. Chief Justice Taney, in *Wartman vs. Wartman*, cannot, therefore, be construed to mean more, than that a party in contempt, cannot take active proceedings against his adversary, or claim any favor or indulgence from the court.

The disobedience of the defendant in that case, was punished by imprisonment, after attachment.

Had the jurisdiction which was exercised by our own local court, over McDonald and White, been supposed to belong to the Circuit Courts of the United States, in Wartman *vs.* Wartman, the removal of the answer of the defendant from the files and the entry of a final decree against him, must have superseded the necessity of detailing in that case, the incapacities arising from his contempt.

Certain it is, however, that the decision of Mr. Chief Justice Taney furnishes no authority, nor color of authority, for the contention, that in a suit in equity, finally closed, and standing to be heard,—upon pleadings and proofs,—the answer of the defendant may be stricken from the files—his evidence ignored—the bill taken *pro confesso*—and a final decree rendered against him—all on account of his contempt and disobedience of an interlocutory order.

APPENDIX E.

(*Ante*, p. 149.)

Removing Answers from the files for contempts, in Divorce Cases.

1. A very respectable writer has remarked:

"In most of our States, and under the present English practice, a husband who will not obey the order of the court to pay alimony, especially, but not exclusively, temporary, and suit money, may be committed as for contempt.

The practice is variously modified, particularly as to permanent alimony in our different States.

Sequestration—is, by some courts, in some circumstances, resorted to.

Execution. In some courts, an execution, or series of executions, may be issued for the alimony ordered, whether temporary or permanent.

Taking away Privileges in the Cause—is sometimes resorted to to enforce payment."

2 Bish. Mar. & Div., § 499 (6th ed., an. 1881).

For this last method of enforcing payment, reference is made by Mr. *Bishop* to certain of the New York decisions,

cited, ante, p. 149; to *Cason vs. Cason*, cited post, (pp. 184–185); *Peel vs. Peel*, cited post, (pp. 185–186,) to *Bird vs. Bird*, 1 Lee (5 Eng. Eccles. Rep.), 527, and *Latham vs. Latham*, 2 Swabey and Tristram's Rep., 299–300, (an. 1861), in which last two cases, the plaintiff husbands were required, *before hearing, or final decree*, to satisfy arrears of alimony directed to be paid *pendente lite*.

2. In England, though parties who are in contempt for non-performance of orders, in causes matrimonial, can take no active or aggressive proceedings against their adversaries, the disobedience of the contemnors is not attended with the destruction, by removal, of their pleadings or their proofs.

Contempts, in such causes, are followed by no other disabilities than those which arose from contempts when committed in the English chancery.

In a suit for divorce brought by the husband, the Court of Arches, after answer by the wife and the filing of proofs, had awarded against her a decree of *confrontation by ways and means*, and the defendant having failed to appear to this decree, as thereby required, an order of publication was prayed by the plaintiff.

Thereupon, the wife, though in contempt of the decree, asserted a new and defensive allegation to the libel.

The Court of Arches having directed the publication and overruled the application of the wife, the decision of that court was affirmed, on appeal, by the Privy Council, in

1846, Lord *Brougham* saying, "It is a general rule that no party shall be allowed to take active proceedings, if in contempt."

Curtis *vs.* Curtis, 5 Moore, P. C. 252–256.

So, when, in 1865, in a suit brought by the wife for judicial separation, the husband was in contempt and disobedience of certain orders passed in the suit, he was refused permission *to withdraw his appearance*, such withdrawal being matter of mere favor and indulgence, in any case.

Garston *vs.* De Garston, 13 Weekly Rep., 508.

And where, in 1886, the wife, while in contempt and disobedience of a decree requiring her to surrender the custody of an infant, applied *for a new trial*, the court, in refusing her application, said: "What she wishes to do, is to disobey the deliberate order of the court, and yet, at the same time, to have the advantage *of the assistance* of this court."

Cavendish *vs.* Cavendish, 15 Weekly Rep., 183.

3. In a suit for divorce, brought by the wife, she announced herself ready for trial, when the cause was called, but insisted that her husband, because then attached and in contempt, for non-payment of provisional alimony, should not be heard.

Thereupon, the trial court ordered "that the cause proceed *ex parte*."

This order, on appeal, was reversed, in 1854.

"No law or practice," it was observed, "has been produced to justify the judgment of the court below, in this case.

We are entirely satisfied that none can be shown. The contempt imputed to the defendant, was for disobeying a rule of the court requiring him to pay temporary alimony. Attachment was the appropriate punishment; and the record shows that this had been granted; but we shall search in vain for a precedent, to sustain the judge in denying to the party his right to defend the libel, because he had failed or neglected to perform his duty in another proceeding. Especially when it was the plaintiff and not the recusant husband, who was pressing the cause to trial; and still more especially, when the attorney of the defendant was asking for the privilege of suspending the cause, until his client could be sent for and brought into Court, to purge himself from the contempt which was charged to have been committed. Why was this privilege withheld? Why should the party be punished by imprisonment,—to say nothing of the loss of his right to be heard, in defence of the libel—provided he could clear himself of the alleged contempt?"

Cason *vs.* Cason, 15 Georgia, 403, 407.

4. The court below having removed the answer of the husband, who was defendant, from the files, for his disobedience to an order requiring him to pay temporary alimony, the action of that court was set aside, on appeal.

The reviewing court, while unprepared to declare, on the one hand, that the answer of the husband when defendant, could, in no case, be stricken from the files, for his refusal to pay temporary alimony, or to assert, on the other, that the marital relation might be terminated through his recusancy or pecuniary inability, said:

"In case of a *plaintiff* who is ordered to pay a sum to enable his wife to resist his application for a divorce, disobedience may be well punished by striking (*sic*) the petition, or dismissing the case. The alimony in such case is al-

lowed to enable his wife to establish her innocence. The dismissal of the action would not affect the rights or condition of the parties. In the case before us the striking (*sic*,) of the answer resulted in a decree of divorce, *without a full investigation into the merits of the controversy.*"

Peel *vs.* Peel, 50 *Iowa*, 521, 532 (an. 1879).

And it is settled, that the practice prevailing in New York, being, in Iowa, sanctioned by no statute, the answer of a defendant husband cannot be removed from the files, in a suit for divorce, because of his disobedience to an order to pay temporary alimony.

Baily *vs.* Baily, 69 Iowa, 77, 78, 79 (an. 1886).

5. To strike out the answer of a defendant husband, and to render a decree *pro confesso* against him, upon the ground of his contempt in disobeying an order for the payment of provisional alimony, is a method of procedure known, perhaps, in but few of the States of the Union.

Johnson *vs.* Superior Court, 63 Cal., 578 (an. 1883);
The State *vs.* Dent, 29 Kan., 416–418;
Russell *vs.* Russell, 69 Maine, 339;
Haines *vs.* Haines, 35 Mich., 146;
McClung *vs.* McClung, 40 *Id.*, 493, 496;
Potts *vs.* Potts, 69 *Id.*, 492 (an. 1888):
In re Finney, 40 Minn., 4 (an. 1889);
Coughlin *vs.* Ehlert, 39 Mo., 285, 286;
McClung *vs.* McClung, 30 N. J. Eq., 462 (an. 1881);
Foster *vs.* Redfield *et al.*, 50 Vert., 285 (an. 1887).